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MINERAL LAW DIGEST

EMBRACING

A DIGEST OF DECISIONS OF THE COURTS AND OF THE LAND DEPARTMENT, UNDER THE PUBLIC MINERAL LAND LAWS; A BRIEF MANUAL OF PROCEDURE, WITH FORMS; AND A MANUAL OF MINERAL SURVEYS AND DEPARTMENTAL REGULATIONS.

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INTRODUCTION.

The public mineral land laws of the United States, governing the disposal of the public mineral lands and regulating the rights of claimants thereunder, are applicable to the following States and Territories:

Alaska, Arkansas, Arizona, California, Colorado, Florida, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming.

The first official recognition of the existence of minerals within the United States is found in the "Resolution under the Confederation and Acts of Congress under the present form of government relating to the public lands."

Resolution No. 26, of May 20, 1785, after directing that a survey be made of the Western Territory, and providing for the disposal of public lands therein, contains the following provision: "There shall be reserved the lot No. 16 of every township; also, one-third part of all gold, silver, lead, and copper mines, to be sold or otherwise disposed of as Congress shall hereafter direct."

There is no apparent reason for supposing that the insertion of the words "gold" and "silver" in said resolution should be attributed to any special prescience on the part of the statesmen of that time, but it is rather to be inferred that the use of these words proceeded from the extreme caution characterizing the legislation of that period.

Resolution No. 91, of April 16, 1800, provides "That the President of the United States be authorized to employ an agent, who shall be instructed to collect all material information relative to the copper mines on the south side of Lake Superior, and to ascertain whether the Indian title to such lands as might be required for the use of the United States in case they should deem it expedient to work the said mines be yet subsisting," etc., thus showing that Congress contemplated the possible operation of said mines by the general government.

Resolution No. 133, of March 3, 1807, section 2, after providing for the granting of permission to actual settlers to hold the possessory title to lands settled upon, as against third parties, contains the following proviso: "That in all cases where the tract of land applied for includes either a lead mine or a salt spring, no permission to work the same shall be granted without the

approbation of the President of the United States, who is hereby authorized to cause such mines or springs to be leased for a term not exceeding three years," etc., thus demonstrating a policy of government control and ownership over mines in the public domain.

Resolution No. 135, of the same date, section 5, provides "That the several lead mines in Indiana Territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States; any grant which may hereafter be made for any tract of land containing a lead mine, which has been discovered previous to the purchase of such tract from the United States shall be considered fraudulent and null; and the President of the United States shall be and is, hereby authorized to lease any lead mine which has been or may hereafter be discovered in Indiana Territory, for a term not exceeding five years."

The use of lands for milling or dumping purposes is evidently provided for in the clause reserving lands contiguous to mines, necessary to the successful working thereof.

Resolution No. 268, of April 19, 1816, contains the following: "Provided the said Legislature [of Indiana] shall never sell, nor lease the same [salt springs] for a longer period than ten years at any one time."

Resolution No. 271, of April 24, 1816, shows that the previous legislation empowering the President to lease mineral lands had been acted upon, as it contains the following: "That the President be and is hereby authorized to lease the U. S. Saline near the Wabash river for a term not exceeding seven years from and after the present term," etc.

It is to be observed that the later resolutions indicate a policy of making longer leases than at first allowed.

The sale of mineral lands was first authorized by the act of March 3, 1829, which conferred upon the President power to sell as other public lands "the reserved lead mines and contiguous lands in the State of Missouri."

By act of July 11, 1846, Congress ordered the sale of the mines and contiguous lands in Illinois, Arkansas, Wisconsin and Iowa, reserving the same from pre-emption entry, however, until after a public offering.

By act of March 1, 1847, the sale of mineral lands in Michigan was authorized at a minimum price of $5 per acre.

By act of March 3, 1847, the same rule of disposition was extended to mineral lands in the Chippewa district of Wisconsin.

By act of September 26, 1850, the lands affected by the last two acts above cited were ordered sold at the ordinary price.

The acts of 1862 and 1864, making grants of land in aid of the construction of the transcontinental railroads, contained reservations of mineral other than coal and iron.

The mineral lands were first expressly thrown open to the public and the fee-simple title thereto offered to the miner by the act of July 26, 1866 (14 Stat. 251), the extensive mining done upon public lands between the discovery of gold in California in 1848 and the passage of said act having been rendered possible by the forbearance of the government, but not having any legal sanction.

By said act only claims of veins or lodes were recognized, no mention being made of placer claims, provision for the disposal of which was first made by the act of July 9, 1870 (16 Stat. 217).

By the act of May 10, 1872 (17 Stat. 91), the acts of 1866 and 1870 were amended and consolidated, the amendments being in favor of the mineral claimants. The act of 1872 was, in turn, embraced in Chapter 6 of Title XXXII of the United States Revised Statutes, which has been made the subject of very little change.

While the National law on this subject covers but a few pages in the statute books, it has been greatly supplemented by enactments by the State legislatures, and by the adoption of rules and regulations by the miners of the several mining districts.

The cases arising under these laws have been made the basis of a large number of decisions, both by the courts, Federal and State, and by the Land Department, and the practitioner having to deal with any of the numerous questions arising under these laws finds it necessary to examine many decisions in order to determine the interpretation given the law.

The lack of a complete digest of this branch of the law has caused the compilers much laborious research, and the material gathered in their daily duties accumulated until it suggested a systematic study of the decisions and the compilation of a digest thereof.

The compilers believe that the digest now offered the profession is exhaustive of the subject treated, reference being made under the proper head to all of the published decisions, and even to some unpublished decisions of the Land Department.

It will be noticed that there is much conflict of authorities on some points. With respect to these the compilers have expressed no opinion, leaving the practitioner to judge for himself which one of conflicting decisions correctly states the law, taking into consideration the dates of the decisions and the tribunals by which rendered.

This book is divided into three parts, as follows:

PART I contains the various sections of the United States Revised Statutes with supplemental or amendatory acts. Under every section are arranged those regulations of the Land Department pertinent to the subject-matter of

the statute. These regulations are followed by a concise digest of decisions upon cases involving the application or construction of that peculiar portion of the statute, the order of arrangement being:

I. Statute.
II. Regulations thereunder.
III. Digest of decisions.

Some of the sections have been found susceptible of analytical subdivision and have been so treated, while a logical subdivision of others has been found impracticable.

PART II is intended as a brief manual of procedure for the use primarily of the mining claimant, but it is thought that it may be found useful as well by the general practitioner whose business would deter him from making a study of the statutes for information set before him as briefly and explicitly as in this manual.

Complicated questions have not been treated herein, and but few citations have been given, the reader being referred, in this particular, to Part I.

PART III contains (together with the surveying manual found on page 149 of Part I) a series of forms covering the essential steps in the acquisition of title. These forms are based upon long familiarity by the compilers with the requirements of the Mineral Land Law and Departmental practice. In their preparation all unnecessary matters and useless verbiage have been omitted.

Following the forms will be found the index, which it is thought is sufficient in detail to enable the reader to readily find any subject-matter contained in the book.

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PART I.

MINERAL LAW DIGEST.

ABBREVIATIONS.

Aiken	Aiken's Vermont Reports.
Am. Dec	American Decisions.
Am. Rep	American Reports.
Beav	Beavan's English Rolls Court Reports.
B. & Ad	Barnewall & Adolphus' King's Bench Reports (English).
Bligh	Bligh's House of Lords Reports.
Caines	Caines' New York Term Reports.
Cal	California State Reports.
Colo	Colorado State Reports.
Conn	Connecticut State Reports.
Cons	Consolidated.
Copp's Min. Lands	Copp's Mineral Lands.
C. L. O	Copp's Land Owner.
Conc	Concentrating.
Dev. & B	Devereux & Battle's North Carolina Law Reports.
Dev	Developing.
Dev't	Development.
Fed. Rep	Federal Reporter.
G	Gold.
Greenl	Greenleaf.
Hare	Hare's Vice Chancellor's Reports (English).
How	Howard's United States Supreme Court Reports.
Humphreys	Humphrey's Tennessee Reports.
Hydr	Hydraulic.
Ill	Illinois State Reports.
Johns. Cas	Johnson's New York Cases.
Law J. Q. B	Law Journal, Queen's Bench.
L. D	Land Decisions of Interior Department.
L. T. (N. S.)	Law Times, New Series (London).
M	Mining.
M. & M	Mining & Milling.
Mass	Massachusetts State Reports.
Mason	Mason's United States Circuit Court Reports.
Mfg	Manufacturing.
Mont	Montana State Reports.
Mor. Min. Rep	Morrison's Mining Reports (Collection of Mining Cases).
M. & W	Meeson & Welsby's English Chancery Reports.
Nev	Nevada State Reports.
N. H	New Hampshire State Reports.
Op. Atty. Gen	Opinions of United States Attorney General.
Pac. Coast Law Jour	Pacific Coast Law Journal.
Pac. Law Mag	Pacific Law Magazine.
Pac. Rep	Pacific Reporter.
Pa. St	Pennsylvania State Reports.
Porter (Ala.)	Porter's Alabama Reports.
Red	Reduction.
S	Silver.
Scam	Scammon's Illinois Reports.
Sickel's Min. Dec	Sickel's Mining Decisions.
Sm	Smelting.
U. S. App	United States Circuit Court of Appeals Reports.
Vt	Vermont State Reports.
Wall	Wallace's United States Supreme Court Reports.
Woolworth	Woolworth's United States Circuit Court Reports.

MINERAL LAW DIGEST.

RESERVATION OF MINERAL LANDS.

I. THE STATUTE.
II. DECISIONS.

I. THE STATUTE.

In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. 14 Stat. 86; 18 Stat. 476; sec. 2318, U. S. Rev. Stat.

II. DECISIONS.

See United States v. Gear, 3 How. 120; Cooper v. Roberts, 18 How. 73; United States v. Gratiot, 14 Pet. 526; Sparrow v. Strong, 3 Wall. 97; Secretary v. McGarrahan, 9 Wall. 298; United States v. Gratiot, 1 McLean, 454; Indiana v. Miller, 3 McLean, 151; 3 Op. Atty. Gen. 277; 5 Op. Atty. Gen. 247; 7 Op. Atty. Gen. 636; 10 Op. Atty. Gen. 184.

The decisions enumerated above, though not forming a part of the present mineral-land laws of the country, may be of interest and use as containing a history of legislation upon the subject of minerals in the public domain, and indicating the formation and growth of the policy of the government with relation to the same, prior to the enactment of the general mining laws of 1866 and 1872.

Decisions in harmony with the law will be found extending throughout the digest, and particularly under the title of "Character of Land."

MINERAL LANDS DECLARED TO BE FREE AND OPEN TO EXPLORATION AND PURCHASE.

I. THE STATUTE.
II. DECISIONS.

I. THE STATUTE.

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. 17 Stat. 91; 19 Stat. 52; sec. 2319, U. S. Rev. Stat.

II. DECISIONS.

"It is the policy of the country to encourage the development of its mineral resources. The act of July 26, 1866 (14 Stat. at L. 251), declared that all mineral deposits on lands belonging to the United States were free and open to exploration, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who had declared their intention to become such, subject to regulations prescribed by law, and to the rules and customs of miners, in their several mining districts, so far as the same were applicable and not inconsistent with the laws of the United States. This declaration of the freedom of mining lands to exploration and occupation was repeated in the act of congress of May 10, 1872 (17 Stat. at L. 91), and is contained in the Revised Statutes, section 2319. Both acts provided for the acquisition of title, by patent, to mineral lands: the first act, to such as constituted lode claims; the second, to such as constituted placer claims." Steel v. St. Louis Sm. Co., 106 U. S. 447.

MINING CLAIMS, ETC.

I. THE STATUTE.
II. REGULATION.
III. DECISIONS.
1. *Mining Claims.*
2. *Veins or Lodes.*
(1) Definitions.
(2) Size and Shape of Claim.

III. DECISIONS — continued.
2. *Veins or Lodes* — continued.
(3) Discovery.
(4) Expenditure.
(5) Applications.
(6) Mill Site.
(7) Town Site.
(8) Agricultural Claim.
(9) Survey.
(10) Cross Lodes.
(11) Strike.
(12) End and Side Lines.
(13) Apex and Dip.
(14) Placer.
(15) General.
3. *Minerals.*
4. *Length and Width.* (See SURVEY.)
5. *Discovery.*
(1) Tunnel.
(2) Record.
(3) Agricultural Lands.
(4) Title.
(5) Placer.
(6) Patent.
(7) Expenditure.
(8) Dip and Apex.
(9) Shaft.
(10) Abandonment.
(11) Posting.
(12) Time.
(13) Location.
(14) General.
6. *End Lines.*

I. THE STATUTE.

Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end-lines of each claim shall be parallel to each other. 17 Stat. 91; 19 Stat. 52; sec. 2320, U. S. Rev. Stat.

II. REGULATION.

*18. The statutes provide that no lode claim shall be recorded until after the discovery of a vein or lode within the limits of the claim located, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

III. DECISIONS.

1. *Mining Claims.*

1. A mining claim is a located piece of ground including the vein; but it is not the *vein*, under the act of 1872. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

2. The difference between a location and a mining claim is, that a location is the appropriation according to law of a parcel of mineral-bearing land, while a claim comprises one or more locations. Poire v. Wells, 6 Colo. 406.

3. "A mining claim is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with the mining laws, local and statutory. It must, under the law of congress of 1872 (Rev. Stat., sec. 2320), be located upon at least one known vein or lode, but the vein or lode is not the whole claim." "A mining claim . . . is not merely a vein or lode, but that with a certain quantity of surface ground." Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

4. A mining "claim," as the word is used in the mining laws, may mean a single location or a consolidation of several locations. S. F. Mackie, 5 L. D. 199; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

5. The term "mining claim" is used by miners as synonymous with "location." McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076.

6. The words "location" and "mining claim" do not always represent the same thing. The distinction discussed, and defi-

*Departmental Circular of December 10, 1891. The paragraphs of the Regulations are numbered as in the official circular, but are arranged in this book according to subject-matter.

nitions given. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Territory v. Mackey, 8 Mont. 168; 19 Pac. Rep. 315.

7. A mining claim is a parcel of land containing precious metals in its soil. A location is the act of appropriating such parcel according to certain established rules. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

8. Under the law of 1872, a mining claim is a piece of land as distinguished from a lode on which the location is based. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Journal, 405; 4 Mor. Min. Rep. 390; Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

9. The fee in the land on which mining claims are located remains in the United States, but the rights of miners are incident to the fee and have been carved out of it. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

10. An owner of a mining claim may relocate it under a different name. Phillpotts v. Blasdell, 8 Nev. 61; 4 Mor. Min. Rep. 341.

11. A mining claim is known to exist when located. Mantle v. Noyes, 127 U. S. 348. (See 5 Mont. 274; 5 Pac. Rep. 856.) Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574.

12. The owner of a mining claim is *prima facie* owner of all minerals inside his surface lines; but if evidence is introduced going to show that the vein in controversy has its apex outside of the claim, he must prove his right to it by proving its apex to be inside. Jones v. Prospect Mtn. T. Co., 21 Nev. 339; 31 Pac. Rep. 642; Leadville M. Co. v. Fitzgerald, 4 Mor. Min. Rep. 380; Gilpin v. Sierra Nev. Cons. M. Co., 2 Idaho, 662; 23 Pac. Rep. 547; Bell v. Skillicorn, 28 Pac. Rep. 768.

13. "It is the discovery of mineral that entitles the discoverer to a claim; it is equally meritorious whether discovered in the discovery shaft or in any other part of the surface ground of his claim, as the national statute is silent as to where it shall be found." Wight v. Tabor, 2 L. D. 738.

14. A claim is an entirety, and it need not be shown that improvements are situate upon any particular portion of the claim where it has been enlarged by amendment of the location. Lincoln Placer, 7 L. D. 81.

15. The act of May 17, 1884 (23 Stat. 24), protects possessory claims to mines in Alaska, theretofore initiated, though not based upon a compliance with all the provisions of the United States laws relative to the location of mining claims. Bennett v. Harkrader, 158 U. S. 441.

16. A mill site is a mining claim or possession under section 2392, United States Revised Statutes, and is excepted from a town site patent if located prior to town site entry. Hartman v. Smith, 7 Mont. 19; 14 Pac. Rep. 648.

17. Mines within the limits of incorporated towns discussed. Steel v. St. Louis Sm. Co., 106 U. S. 447.

18. A claimant under a town site patent which contained the usual exception of mining claims acquired no interest in a valid mining claim or in the surface thereof. Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858.

19. The Land Department cannot include in a town site patent any mine, mining claim or mining possession. If such is included in the patent, the patent to that extent is void. Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbot v. King, 6 Mont. 76; 9 Pac. Rep. 434.

20. Occupancy of land for town site purposes will not prevent its legal location as a mining claim. Poire v. Wells, 6 Colo. 406.

21. Mere occupation of public land as a town lot will not prevent mining of the land. Martin v. Browner, 11 Colo. 12; 1 Mor. Min. Rep. 618.

22. Known mining claims are excepted from town site patents. Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858; King v. Thomas, 12 Pac. Rep. 865.

23. An agricultural patent is void as against a pre-existing valid mining claim. Gold Hill Qtz. M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

24. The owner of an unsurveyed mining claim in conflict with an agricultural entry, and which the Land Department holds should be excluded from the agricultural entry, must have an official survey of his claim made. Winters v. Bliss, 14 L. D. 59.

25. A tunnel claim should be protected by an adverse, being a mining claim. Back v. Sierra Nevada Cons. M. Co., 2 Idaho, 386; 17 Pac. Rep. 83.

26. Mere possession of a mining claim will be protected as against one having no better title. Patchen v. Keeley, 19 Nev. 404; 14 Pac. Rep. 347; Crossman v. Pendery, 2 McCrary, 139; 8 Fed. Rep. 693; 1 Colo. Law Rep. 496; 4 Mor. Min. Rep. 431.

27. Actual possession of a portion of a mining claim, according to the custom of miners in a given locality, extends by construction to the limits of the claim held in accordance with such custom. Hicks v. Bell, 3 Hepburn, 220 (1853).

28. Mere possession of abandoned mining improvements is not a mining claim. Richards v. Dower, 81 Cal. 44; 22 Pac. Rep. 304. See, also, Same Case, 151 U. S. 658.

29. One claiming a mining claim beyond a *possessio pedis* must show a constructive possession, which must result either from a compliance with the laws governing locations of mining claims or by physical works or monuments. Roberts v. Wilson, 1 Utah, 292; 4 Mor. Min. Rep. 498.

30. A corporation whose members are citizens may locate a mining claim. Thomas v. Chisholm, 13 Colo. 105; 21 Pac. Rep. 1019.

31. A domestic corporation is presumed to be competent to hold a mining claim. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

32. A minor may locate a mining claim. Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182; Com'r to Francis Cunningham, 7 C. L. O. 179; Com'r to N. P. Stilson, June 15, 1893.

33. The possessory right of a miner may be taxed by a state. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183; Hale & Norcross G. & S. M. Co. v. Storey County, 1 Nev. 104; 14 Mor. Min. Rep. 115; State v. Moore, 12 Cal. 56; 14 Mor. Min. Rep. 110; Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240.

34. One holding a mining claim under a location may sue in trespass one who removes timber from the claim. McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076.

35. One holding a mining claim by possessory title may remove timber therefrom when necessary for mining purposes, but not for the purpose of sale. United States v. Nelson, 5 Sawy. 68; 14 Mor. Min. Rep. 381.

36. The statement that a mining claim is "situated about fifteen hundred feet N. W. by N. of the Mountain Pride Lode" in a location record is, in the absence of a showing to the contrary, a sufficient description of the *locus* of the claim. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

37. The statutes of Montana which regulate the descent and distribution of real property are applicable to quartz lodes. Carhart v. Montana Mineral, etc., 1 Mont. 245.

38. Mining claims under the Montana statutes are real estate, and are within the statute of frauds, and can only be transferred by deed. Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287.

39. Mining claims held by possessory title are property in the fullest sense of the word, and may be sold, transferred, mortgaged and inherited; and a location made in accordance with law has the effect of a grant by the United States of the right of present and exclusive possession. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183; Belk v. Meagher, 104 U. S. 279. (See 3 Mont. 65; 1 Mor. Min. Rep. 510.) Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611; Manuel v. Wulff, 152 U. S. 505. (See 9 Mont. 279; 23 Pac. Rep. 723.)

40. The right to a mining claim held by possessory title is such property as may be made the subject of partition. Aspen M. & S. Co., 28 Fed. Rep. 220; Gillett v. Gaffney, 3 Colo. 351; Sears v. Taylor, 4 Colo. 38; Filmore v. Reithman, 6 Colo. 124; McKeon v. Bisbee, 9 Cal. 137; 2 Mor. Min. Rep. 309; Watts v. White, 13 Cal. 324; Merritt v. Judd, 14 Cal. 59; Lowe v. Alexander, 15 Cal. 302; Hughes v. Devlin, 23 Cal. 501; 12 Mor. Min. Rep. 241; Spencer v. Winselman, 42 Cal. 479; Dall v. Confidence S. M. Co., 3 Nev. 531.

41. Mining claims should be conveyed by deed, being realty granted by the United States by the mineral land laws. Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287; Melton v. Lambard, 51 Cal. 258; 14 Mor. Min. Rep. 695. *Contra*, Union Cons. M. Co. v. Taylor, 100 U. S. 42; 5 Mor. Min. Rep. 328; Table Mtn. Tunnel Co. v. Stranahan, 20 Cal. 198; 9 Mor. Min. Rep. 457; Gatewood v. McLaughlin, 23 Cal. 178; Patterson v. Keystone M. Co., 23 Cal. 576; Hardenbergh v. Bacon, 33 Cal. 381.

42. Mining claims upon public lands are property in the fullest sense of the word, which may be sold, transferred, mortgaged and in-

herited without infringing the title of the United States. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183.

43. A verbal sale of a mining claim, even though accompanied by delivery of possession, does not convey legal title. Goller v. Fett, 30 Cal. 481; 11 Mor. Min. Rep. 171.

44. In early times, parol transfers of mining claims, followed by change of possession, were recognized as legal. Kinney v. Cons. Virginia M. Co., 4 Sawy. 382; 10 Mor. Min. Rep. 457.

45. Generally speaking, the ordinary rules of real property are applied to mining claims held under possessory right. They may be conveyed, are subject to sale on execution, and descend as realty. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178.

46. The name by which a lode claim is conveyed is immaterial if it may be identified. Phillpotts v. Blasdell, 8 Nev. 61; 4 Mor. Min. Rep. 341.

47. A mining claim may be conveyed by name, reference being made to the location record. Carter v. Bacigalupi, 23 Pac. Rep. 361.

48. A mining claim is property and may be sold. Suessenbach v. First Nat. Bank, 5 Dak. 477; 41 N. W. Rep. 662.

49. Mining claims are treated as real estate although held under conditions, and may be conveyed by deed and sold on execution and descend to the heir. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178; Atkinson v. Taylor, 7 Colo. 195; Atwood v. Fricot, 17 Cal. 38; 2 Mor. Min. Rep. 305; Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217.

50. Where each of several locators claims a distinct portion of a fifteen hundred foot claim, each of such portions is a separate claim and must be located and developed as such. Zeckendorf v. Hutchison, 1 New Mex. 476; 9 Mor. Min. Rep. 483.

51. Mining claims on the public lands must be held and worked in accordance with the local mining laws adopted and in force in the mining district where the same are located. Strang v. Ryan, 46 Cal. 33; 1 Mor. Min. Rep. 48.

52. An entry should not be allowed for a lode claim made non-contiguous by the exclusion of a placer claim. Apple Blossom Placer v. Cora Lee Lode, 21 L. D. 438.

53. The owner of a lode claim has a *prima facie* right to all ore within the surface lines, and if another takes ore therefrom, claiming it to be contained in a lode which has been located and which dips under the first claim, such fact must be proved to avoid liability. Driscoll v. Dunwoody, 16 Pac. Rep. 726.

54. It is presumed by the Land Department, in the absence of a contrary showing, that the lode extends in a straight line through the center of a surveyed claim. Bi-metallic M. Co., 15 L. D. 309.

55. If the presumed line of the lode is interrupted by a tract excluded as non-mineral, the lode claimant may not embrace the non-contiguous portions of his lode in one mineral entry. Andromeda Lode, 13 L. D. 146; Bi-metallic M. Co., 15 L. D. 309.

56. The owner of a mining claim may not follow the lode on its strike outside his claim. Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

57. "However tortuous might be the course of the lode, the claimant has a perfect right to follow it up and prepare his diagram so as to include it, together with the surface ground on each side thereof allowed by local laws. There is no language in the act that requires the diagram to be in the form of a parallelogram or in any particular form." Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

58. The locator of a mining claim need not purchase from the United States until he so wishes. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183; United States v. Nelson, 5 Sawy. 68; 14 Mor. Min. Rep. 381.

59. "In all cases where mining claims lie partly in one land district and partly in another, applications for patent therefor should be filed in that district where the principal workings of the claim are situated, as shown by the plat and field-notes; and the diagrams and notices should be posted near to such workings. A copy of the notice and of the diagram should be posted in the register's office in such district." Com'r to San Francisco Office, Nov. 12, 1875, 2 C. L. O. 130.

60. If a claim is made the subject of two entries, in different land districts, only one patent will issue for the claim. New Orleans Lode, Rapid City, South Dak., Mineral Entry No. 356, and Buffalo, Wyoming, Mineral Entry No. 6.

2. *Veins or Lodes.*

(1) Definitions.

61. "A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or some other rock in place carrying gold, silver, or other valuable mineral deposits named in the statute; it may be very thin and it may be many feet thick, or thin in places, almost or quite pinched out, in the miner's phrase, and in other places widening out into extensive bodies of ore. So also, in places, it may be quite or nearly barren, and at others be immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle a miner to make a valid location, including the vein or lode. It may, and often does, require much time and labor and expense to develop the vein or lode, after discovery and location, sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary before incurring such expenses in developing the vein, to secure to the miner the fruits of his labor and expense in case a rich mine should be developed." North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

62. Only veins containing metalliferous ores are subject to location under section 2320, United States Revised Statutes. Dobbs Placer, 1 L. D. 565.

63. A vein is an "aggregation of mineral matter in fissures of rock." Bainbridge on Mines, p. 2.

64. "Vein or lode," "rock in place," "valuable mineral deposits," defined. Com'r to Surveyor-General and Registers and Receivers, July 15, 1873, Copp's Min. Lands (2d ed.), 50.

65. If two ore bodies have the same kind of boundaries, and are connected by the same boundaries or contact, they may be said to be a part of one lode. Leadville M. Co. v. Fitzgerald, 4 Mor. Min. Rep. 380.

66. A lode is in place if the principal part of the rock above it (hanging wall) is in place. Leadville M. Co. v. Fitzgerald, 4 Mor. Min. Rep. 380.

67. If an ore body is continuous, within inclosing rocks, it is in place. Iron Silver M. Co. v. Cheesman, 2 McCrary, 191; 9 Mor. Min. Rep. 552.

68. On the issue of continuity of a vein expert testimony is admissible. Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645.

69. A location is made of the vein (1858). Johnson v. Parks, 10 Cal. 446; 4 Mor. Min. Rep. 316.

70. A lode is a mineral body in the general mass of the mountain. Iron Silver M. Co. v. Cheesman, 2 McCrary, 191; 9 Mor. Min. Rep. 552.

71. "A body of mineral or mineral-bearing rock, in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries may be implied. An impregnation, to the extent to which it may be traced as a body of ore, is as fully within the broad terms of the act of congress as any other form of deposit." Hyman v. Wheeler, 29 Fed. Rep. 347; 15 Mor. Min. Rep. 519.

72. The terms "vein," "lode" and "ledge" are supposed to be nearly synonymous, and mean a continuous body of mineral-bearing rock within defined boundaries in the general mass of the mountain, whether of greater or less extent, thick or thin. Iron Silver M. Co. v. Cheesman, 2 McCrary, 191; 9 Mor. Min. Rep. 552.

73. Clay or shale may form one wall of a vein. Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 9 Mor. Min. Rep. 578.

74. Definition of "vein" is similar to that given in the Eureka case. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

75. A valid location may be made on croppings without proving the value of the vein contained. Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

76. Assays made from samples are but slight evidence of the value of the vein from which the samples are taken. Cheesman v. Shreeve, 40 Fed. Rep. 787.

77. It is immaterial whether ore is of high or low grade. Stevens v. Gill, 1 Mor. Min. Rep. 576; 16 Am. Law Rep. 304; Golden Terra M. Co. v. Mahler (Smith), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep.

390; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529. For discussion of this subject, see Book v. Justice M. Co., 58 Fed. Rep. 106. Whether thick or thin is immaterial. Iron Silver M. Co. v. Cheesman, 8 Fed. Rep. 297.

78. "While metalliferous rock in place may be so found within defined boundaries as to require recognition as a lode, although not in a fissure, a broad metalliferous zone cannot be permitted to swallow up, under the name 'lode,' true fissure veins found within its limits." Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

79. Mere belief in the existence of a vein is not knowledge thereof. Sullivan v. Iron Silver M. Co., 143 U. S. 431.

80. A mineral lode, as the term is used by miners and the mining acts of Congress, is a zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock, but does not include a deposit of gold-bearing gravel, although the same may lie between clearly-defined strata of rock, and have an average drop of several degrees. Such a deposit of gravel is a placer, as that term is used by miners and in section 2329, United States Revised Statutes. Gregory v. Pershbaker, 73 Cal. 109; 14 Pac. Rep. 401; 15 Mor. Min. Rep. 602.

81. Location gives the discoverer title to the vein discovered, and also all other veins the apexes of which are inside of the claim located. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

82. "The line of location includes the surface ground and the vein or lode, and measures the extent of the miners' right." A location is of surface ground as well as of the vein or lode. McCornick v. Varnes, 2 Utah, 355; 9 Mor. Min. Rep. 505.

83. A vein can only be located by means of a surface claim, and held only to the extent that it is included within the surface lines (except as to rights to follow it on its dip). Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

84. Possession of a vein, recognized by the mining laws to which protection is given, is by one who holds the surface where the vein makes its apex. Eilers v. Boatman, 3 Utah, 59; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462. See 111 U. S. 356; 15 Mor. Min. Rep. 471.

85. Entry should not be allowed when it is shown that the lode is not embraced within claimed ground, as the right to surface ground depends on possession of a lode therein. Branagan v. Dulaney, 2 L. D. 744.

86. "Whether the *ore* is loose and friable, or very hard, if the inclosing walls are country rock, it may be located as a vein or lode. But if the ore is on top of the ground, or has no other covering than the superficial deposit which is called alluvium, diluvium, drift or debris, it is not a lode or vein, within the meaning of the act, which may be followed beyond the lines of the location." Tabor v. Dexter, 9 Mor. Min. Rep. 614.

87. "A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature in which the mineral is deposited, would seem to be essential to a lode in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

88. Under the law of 1872, a mining claim is a piece of land as distinguished from a lode on which the location is based. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

89. Rock in place is not necessarily quartz, but may be any combination of rock, broken up, mixed with minerals and other things. Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557.

90. Expert testimony is admissible to show that a claim contains such a vein as a miner discovering it would be likely to follow with the reasonable expectation of finding paying ore. Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362. See 111 U. S. 350.

91. A short interruption of ore matter will not be considered a discontinuance of a vein or lode if other distinguishing features re-

main. Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557. See, also, Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Law Rep. 304.

92. "It must be remembered that every seam or crevice in the rock, even though filled with clay, earth or rock, does not constitute a vein, nor every ridge of stained rocks its croppings. Nor on the contrary, is it required that well-defined walls shall be developed, or paying ore found within them. But something must be found in place, as rock, clay or earth, so colored, stained, changed and decomposed by the mineral elements as to mark and distinguish it from the inclosing country." Burke v. McDonald, 2 Idaho, 646; 33 Pac. Rep. 49.

93. "A lode or vein is a body of mineral or mineral-bearing rock, within defined boundaries, in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock, and the boundaries. With either of these things established, very slight evidence may be accepted as to the existence of the other." Hyman v. Wheeler, 29 Fed. Rep. 347; 15 Mor. Min. Rep. 519.

94. A vein is by no means always a straight line, of uniform dip or thickness, or richness of mineral matter throughout its course. Generally they are found in clefts or fissures in the surrounding rock, with a well-defined wall above and below. Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

95. "A vein is discovered when there is disclosed a well-defined body of rock in place carrying gold, which body subsequently proves to be continuous." The only line of demarkation between the vein and the country rock may be the commencement of the rock to bear mineral. Regular, well-defined and easily-distinguished walls are not essential to the existence of the vein. It is not necessary that the ore found shall be "pay ore," for what is waste to-day may, with changed surrounding circumstances, prove to be "pay ore" to-morrow. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 399; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

96. The boundaries of a lode are not necessarily such as are visible, but may be such as may be established only by assays. Hyman v. Wheeler, 29 Fed. Rep. 347; 15 Mor. Min. Rep. 519.

97. Whether it is in the form of a broken mass of blue and brown lime, between regular walls of the same rocks, or a part of such strata in solid formation, mineralized by replacement of some of their constituents with valuable metals, the result is the same, and the name which science may apply to it is of no importance. Hyman v. Wheeler, 29 Fed. Rep. 347; 15 Mor. Min. Rep. 519.

98. "By 'veins or lodes' . . . are meant lines or aggregations of metal imbedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock. Yet a lode may, and often does, contain more than one vein." United States v. Iron Silver M. Co., 128 U. S. 673. (Affirming S. C., 24 Fed. Rep. 568.)

99. Fire clay or kaolin, though with well-defined boundaries, is not a vein or lode, but must be located as a placer. Dobbs Placer, 1 L. D. 565.

100. A formation of broken limestone, boulders, low-grade ore, gravel and sand, with solid rock on each side, is rock in place, the manner or time of its deposit being immaterial. Jones v. Prospect Mtn. T. Co., 21 Nev. 339; 31 Pac. Rep. 642. See Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557, and Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Law Rep. 304.

101. Excluding the waste slide, or debris on the surface of the mountain, all things in the mass of the mountain are in place. Iron Silver Mining Co. v. Cheesman, 116 U. S. 529.

102. A vein or lode authorized to be located is a seam or fissure in the earth's crust, filled with quartz or some other kind of rock, in place, carrying gold, silver or other *valuable* mineral deposits named in the statute. It may be very thin or many feet thick, and it may be rich or poor, provided it contains any of the metals named in the statute. But it must be more than detached pieces of quartz or mere bunches of quartz not in place. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

103. A connected deposit of silver-bearing ore and concomitant vein matter is a vein or lode. Phillpotts v. Blasdell, 8 Nev. 61; 4 Mor. Min. Rep. 341.

104. "And as to the word *vein* or *lode*, it seems to me that these words may embrace

any description of deposit which is so situated (in place) in the general mass of the country, whether it is described in one way or another; that is to say, whether, in the language of the geologist, we say that it is a bed, or a segregated vein, or gash vein, or true fissure vein, or merely a deposit; it matters not what the particular description may be; in respect to those distinctions which are observed by geologists in defining the different classes of deposits that lie in the embrace or are inclosed by the general mass of the mountain. In all cases I suppose that they are lodes if not veins. It may be true that many of these deposits will not come under the description of veins as known to geologists, but if they are not so described — if that cannot be so correctly described — they are, at least, lodes, and are recognized as such by miners in their search for them." Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557. See, also, Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Law Rep. 304.

105. The term "rock in place," as used in the mining acts of Congress, has always received the most liberal construction that the language will admit of, and every class of claims that, either according to scientific accuracy or popular usage, can be classed or applied for as a "vein or lode," may be patented under this law. Com'r to Thomas Boles, July 20, 1871; Sickel's Min. Dec. 522.

106. The definition of a lode given by geologists is that of a fissure in the earth's crust filled with mineral matter, or, more accurately, an aggregation of mineral matter, containing ores in fissures. Van Cotta on Ore Deposits, Primes' Trans. 26.

107. A vein or lode may be a zone with ore in pockets, gashes or chutes. Illinois S. M. & M. Co. v. Raff, 34 Pac. Rep. 544. For several definitions of veins or lodes, see Jones v. Prospect Mtn. Tunnel Co., 21 Nev. 389; 31 Pac. Rep. 642. Citing Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557; Hyman v. Wheeler, 29 Fed. Rep. 347; 15 Mor. Min. Rep. 519; Hibschle v. Gildersleeve, 8 C. L. O. 65; Neils Larsen, 9 C. L. O. 2.

108. The terms "lode" or "vein," as used in the mining acts, are such "lodes" or "veins" as are so called by miners. Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362. See 111 U. S. 350.

109. Mere contact without mineral-bearing ore does not constitute a lode. Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Law Rep. 304. See Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557.

110. Veins or lodes in place are those lying in a fixed position in the general mass of the country rock or mountain. Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557. See Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Law Rep. 304.

111. A vein is "any zone or belt of mineralized rock lying within boundaries clearly separating it from neighboring rock." Cheesman v. Shreeve, 40 Fed. Rep. 787.

112. Not every metalliferous zone is a lode. Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

113. In considering the continuity of a lode or vein, a distinction is to be made between a fissure vein and a contact lode. In the first, the fissure, filled with vein matter, whether valuable or not, marks the existence of the vein. In the second, the mere contact without the presence of mineral will not be accepted as a continuance of the lode, except for a short distance or a few feet. Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557. See Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Rep. 304.

114. "The law will not distinguish between different kinds and classes of ore if they have appreciable value in the metal for which the location was made. Nor is it necessary that the ore shall be of economical value for treatment. It is enough if it is something ascertainable, something beyond the mere trace, which can be positively and certainly verified as existing in the ore." Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Law Rep. 304. See Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557.

115. "Any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes . . . all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same process." Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 9 Mor. Min. Rep. 578; Jupiter M. Co. v. Bodie Cons.

M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

116. "Ore disseminated at intervals, or found in channels, chutes, cavities, pockets or other irregular occurrences at intervals in quartzite, without ore connections between the same, is not a lode or vein within the meaning of the statute." But "slight interruptions of the mineral-bearing rock are not alone sufficient to destroy the identity of a vein." Cheesman v. Shreeve, 40 Fed. Rep. 787.

117. The fracture or dislocation of the walls of a lode will not prevent it being considered in place. Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Law Rep. 804. See Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557.

118. A lode need not necessarily be rock, but may be of earthy or loose friable material, if inclosed by walls in the country rock. Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557. See Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Law Rep. 804.

(2) Size and Shape of Claim.

(See SURVEY, p. 137.)

119. The width of a lode claim may be limited by miners' regulations to twenty-five feet on each side of the middle of the vein. A location embracing more than the width allowed by law or regulation on each side of the middle of the vein is void as to the excess but not in its entirety. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

120. Where a lode is discovered in a discovery shaft and does not outcrop on the surface, it will be assumed that the shaft marks the middle of the vein, in the absence of a contrary showing. Hope M. Co., 5 C. L. O. 116; Albert Johnson, 7 C. L. O. 85.

121. There is no law for the sale of lode claims by legal subdivisions. John O. Welsh, 3 C. L. O. 18.

122. A location of a lode need not be a parallelogram, but may follow the course of the lode, whether that be straight or tortuous. (This principle, applied to the facts in this case, gives a decision contrary to the case of Iron Silver M. Co. v. Elgin M. & Sm. Co., 118 U. S. 196; 15 Mor. Min. Rep. 641.) Breece M. Co., 3 L. D. 11. See to same general effect, Wolfley v. Lebanon M. Co., 4 Colo. 112; 18 Mor. Min. Rep. 282.

123. A location is valid only to the extent of the lode included therein, as the surface is held only in connection with the lode. Terrible M. Co. v. Argentine M. Co., 5 McCrary, 639.

124. The vein is the principal thing in the sense that it is for the sake of the vein that the location is made; the surface is of no value without it. But the *location* is of a piece of *land* including the vein. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

125. "The surface ground and the lode are not independent grants. It is not the purpose of the act to grant surface ground without a discovered lode. The lode is the principal thing and the surface ground incident thereto." Wolfley v. Lebanon M. Co., 4 Colo. 112; 18 Mor. Min. Rep. 282.

126. "However tortuous might be the course of the lode, the claimant had a perfect right to follow it up and prepare his diagram so as to include it, together with the surface ground on each side thereof allowed by local laws. There is no language in the act that requires the diagram to be in the form of a parallelogram or in any particular form." Wolfley v. Lebanon M. Co., 4 Colo. 112; 18 Mor. Min. Rep. 282.

127. "If the lode located terminates at any point within the location, or departs at any point from the side lines, the location beyond that point is defeasible if not void." Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542; Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Re-affirmed in 6 Colo. 581; 15 Mor. Min. Rep. 458.)

128. "When one has discovered a lode upon the unappropriated public domain, and has, within the proper time, in good faith, performed all the subsequent acts essential to a valid location, as provided by law, he is entitled to the presumption that his lode extends throughout the full length of the claim" (as against another lode claimant). The burden of disproving this is upon the one denying it. Armstrong v. Lower, 6 Colo. 581; 15 Mor. Min. Rep. 458. (Affirming 6 Colo. 393; 15 Mor. Min. Rep. 631.) See, also, Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

129. A lode claim divided into two noncontiguous tracts by land patented as agricultural in character can be entered only as

to one of such tracts. Departmental decision of March 31, 1896, in case of George H. Hewitt.

130. A location which is separated along the line of the lode by a patented location made on a parallel lode is invalid as to one of the non-contiguous portions of the lode, as all parallel lodes embraced in the patented claim passed under the patent therefor. Col. Hall Lode, Keanage M. Griffin, 2 L. D. 735, 736.

131. A lode claim intersected by an excluded placer must be restricted upon entry to that one of its non-contiguous parts on which is situate the discovery. Silver Queen Lode, 16 L. D. 186.

132. If the presumed line of the lode is interrupted by a tract excluded as nonmineral, the lode claimant may not embrace the non-contiguous portions of his lode in one mineral entry. Andromeda Lode, 18 L. D. 146; Bi-metallic M. Co., 15 L. D. 309.

133. It is presumed by the Land Department, in the absence of a contrary showing, that the lode extends in a straight line through the center of a surveyed claim. Bimetallic M. Co., 15 L. D. 309.

134. Under the act of May 10, 1872, it is the land containing the lode that is located, not the lode upon a discovery of which the location is based. Golden Terra M. Co. v. Mahler (Smith), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

135. Surface ground is simply an adjunct to the lode and must be coterminous therewith. Engineer Mining & Developing Co., 8 L. D. 361; Plevna Lode, 11 L. D. 236.

136. A claimant who locates a claim in good faith, as discoverer of a vein afterward found to be part of one great lode underlying a large tract, is entitled to the additional two hundred feet of the vein allowed by local law to discoverers. Richmond M. Co. v. Rose, 114 U. S. 576.

137. The Montana statute (1864) allowing surface ground fifty feet on each side of the lode, construed as meaning fifty feet on each side of the inclosing walls of the lode, allowing the width of the claim to be one hundred feet plus the width of the lode. Foote v. National M. Co., 2 Mont. 402; 9 Mor. Min. Rep. 605.

138. Lode claims located under the territorial act of December 26, 1864, in Montana, cannot exceed one hundred feet in width. Com'r to Helena Office, Aug. 6, 1874, 1 C. L. O. 162; Tootle, Hann & Co., 3 C. L. O. 67.

(3) Discovery.

(See DISCOVERY, p. 82.)

139. A discovery of a vein or lode within the claim is essential to a valid location. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Bryan v. McCaig, 10 Colo. 309; 15 Pac. Rep. 413.

140. A locator need not be the discoverer of the vein located, but must have known of its existence. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

141. No valid location can be made until a vein or deposit of gold, silver, or metalliferous ore or rock in place has been discovered. Gleeson v. Martin White M. Co., 13 Nev. 457; Overman S. M. Co. v. Corcoran, 15 Nev. 417; 1 Mor. Min. Rep. 691.

142. A vein is discovered when there is disclosed a well-defined body of rock in place carrying gold, which body is afterwards proven to be continuous, without regard to the value of such body as pay ore. Golden Terra M. Co. v. Mahler (Smith), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

143. Assays of rock taken from a claim subsequent to location may tend to show that, at date of location, a vein of mineral-bearing rock had been discovered. Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; 9 Mor. Min. Rep. 513.

144. After discovery the discoverer has a reasonable time within which to trace his lode and mark the surface lines of his claim. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

145. A lode discovered in a tunnel run under the provisions of section 2323, United States Revised Statutes, and of which a location notice was posted at the mouth of the tunnel, and duly recorded, need not be located by the discoverer on the surface to protect his right, and a subsequent locator on the surface acquires no rights. Ellet v. Campbell, 18 Colo. 510; 33 Pac. Rep. 521.

146. Before a tunnel claimant, under section 2323, United States Revised Statutes, ac-

quires any right to a lode, it must be discovered in the tunnel. Corning Tunnel & M. Co. v. Pell, 4 Colo. 507; 14 Mor. Min. Rep. 612.

147. A lode location will be presumed to cover the lode discovered in the absence of a showing to the contrary. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

148. The plaintiff in an action of ejectment between the owners of conflicting mining claims must prove a discovery in his discovery shaft and that the lode there discovered extends to the ground in conflict. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

149. "The discovery by the defendant of the Dahl lode two or three hundred feet outside of those boundaries does not, as observed by the court below, create any presumption of the possession of a vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them." Dahl v. Raunheim, 132 U. S. 260.

150. It is well settled that the rights of the miner to the surface ground of his location are dependent upon his discovery, and upon the relation which the vein, in its course and direction, bears to the surface as it has been located. The grant of the vein has always been held to be the principal thing and the surface but an incident, which, as to its extent, is entirely determined by the course of the principal thing granted, to wit, the vein. Patterson v. Hitchcock, 3 Colo. 532; 5 Mor. Min. Rep. 542; Colorado Midland Ry. Co. v. Croman, 10 Colo. 381.

151. Evidence as to the extent and richness of the vein, as developed subsequent to location, is inadmissible for the purpose of showing the location to have been based upon a discovery thereof. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404. See S. C., 5 Mont. 600; 6 Pac. Rep. 66.

152. "It [sec. 2320, U. S. Rev. Stat.] allows a claim to be located to the extent of fifteen hundred feet along the vein or lode, but provides that no location shall be made until the discovery of the vein or lode within the limits of the claim located; which is, in effect, a declaration that locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits shall not be permitted. A location can only rest upon an actual discovery of the vein or lode." King v. Amy & Silversmith M. Co., 152 U. S. 222. See, also, 9 Mont. 543; 24 Pac. Rep. 200.

153. The forcible ouster of one who has discovered a mineral-bearing lode and has posted a notice of his claim thereon, by a trespasser, during the time allowed the discoverer by law to perfect his location, and the prevention of the discoverer from compliance with the law in that regard, excuse him, at least as against such intruder, from a performance of the various acts necessary to a legal location. Erhardt v. Boaro, 113 U. S. 527; 4 Mor. Min. Rep., 432. See 2 McCrary, 141; 1 Mor. Min. Rep. 452.

(4) Expenditures.

(See EXPENDITURES, p. 224.)

154. Where a lode claim is located over a survey already patented, the subsequently located lode must be shown to extend beyond the lines of the patented survey. The new discovery shaft cannot be located on such patented claim. Improvements made within the patented ground cannot be credited to the later claim. John G. Kennedy, 10 C. L. O. 150.

155. Annual expenditures must be made upon placer claims as well as upon lode claims. Circular, March 24, 1887, 8 L. D. 505.

156. Lodes located prior to May 10, 1872, upon which the required expenditure has been made since May 10, 1872, and prior to January 1, 1875, are not subject to relocation at the later date. Shoo Fly Lode v. Mono Lode, 1 C. L. O. 135.

157. Where a claim has been relocated for abandonment by one of the original claimants, he cannot be credited with the expenditure made under the original location, as all rights thereunder have been forfeited. Max Boehmer, 8 C. L. O. 3.

158. Where a mill site and lode are applied for, $500 expenditure is required on the lode claim only. Com'r to Surveyor-General of Colorado, 1 C. L. O. 2.

159. The act of February 11, 1875, credits to a lode claim the expenditures made in running a tunnel for the purpose of developing the lode owned by the proprietors of the tunnel. Geo. S. Dodge, 6 C. L. O. 122.

(5) Application.

(See APPLICATION, p. 174.)

160. If, subsequent to the survey of several contiguous claims, title thereto becomes vested in one person, he may embrace all of said claims so surveyed in one application for patent. William De Witt, 9 C. L. O. 34.

161. During the pendency of a suit based upon an adverse claim filed by a placer claimant against an application for patent for a lode claim, entry may not be allowed upon said application. Clipper M. Co., 22 L. D. 527.

162. A placer claim and a lode claim, noncontiguous to each other, may not be embraced in one application for patent under section 2333, United States Revised Statutes. Com'r to Henry O'Connor, January 10, 1879, 5 C. L. O. 162.

(6) Mill Site.

(See MILL SITE, p. 355.)

163. A mill site abutting on the end of a lode claim may be shown to be non-mineral, and may be patented. Departmental decision *In re* National M. & Exploring Co., 7 C. L. O. 179; Com'r to R. F. Long, 9 C. L. O. 189.

164. An applicant for patent to a mill site under the first clause of section 2337, United States Revised Statutes, must show title to the lode claim in connection with which it is claimed. Com'r to Hailey Office, July 3, 1896, *In re* Grouse Creek No. 2, Mill Site.

165. Patent will not issue for a lode claim divided into two non-contiguous parts by a patented mill site, but may be issued for the tract on which are situate the discovery and improvements. Andromeda Lode, 13 L. D. 146.

166. An applicant for a lode patent, by excluding conflict with a mill site, admits the non-mineral character of the land embraced therein, and if the assumed course of the lode is intersected by said mill site, the lode claimant may retain in his application only one of the non-contiguous parts of his claim. Michael Howard, 15 L. D. 504.

167. The use, in a mine, of timber growing upon land is not such a use of the land as will warrant entry thereof as a mill site appurtenant to the mine, under the first clause of section 2337, United States Revised Statutes. Two Sisters Lode and Mill Site, 7 L. D. 557.

168. An entry of a lode and mill site defective in that notice of application for patent was not posted upon the mill site may be referred to the Board of Equitable Adjudication. New York Lode and Mill Site, 5 L. D. 513. (Overruling Bailey and Grand View M. & Sm. Co., 3 L. D. 386.)

169. To be enterable under the first clause of section 2337, United States Revised Statutes, a mill site must be actually used, as a present fact, for mining or milling purposes, in direct connection with the lode claim to which it is claimed to be appurtenant. Peru Lode and Mill Site, 10 L. D. 196.

170. Where a lode claim and a mill site appurtenant thereto are embraced in one survey and in one application for patent, the survey of the mill site need not be connected with a corner of the public surveys or a United States mineral monument, if connected with the survey of the lode claim; and in such case it is not incumbent upon the claimant to show an expenditure of $500 upon the mill site, its use or occupancy for mining or milling purposes in connection with the lode claim being sufficient to entitle claimant to ask for a patent therefor. Alta Mill Site, 8 L. D. 195.

(7) Town Site.

(See TOWN SITE, p. 451.)

Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States. Sec. 2386, U. S. Rev. Stat.

No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar or copper; or to any valid mining claim held under existing laws. Sec. 2392, U. S. Rev. Stat.

171. A known mining claim is excepted from a town site patent. Silver Bow M. & M. Co. v. Clarke, 5 Mont. 378; 5 Pac. Rep. 574; Butte Cite Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858; King v. Thomas, 12 Pac. Rep. 865; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434. And may be patented to mineral claimant. Com'r to Denver Office, Nov. 16, 1895, Antediluvian Lode.

172. The owner of a town lot under a patent issued prior to 1872 has the absolute fee-simple title to all of the lot in which known mines did not exist. A mine-owner

has no right to tunnel or work on those portions of the lot where a mine does not exist. Dower v. Richards, 73 Cal. 477; 15 Pac. Rep. 105.

173. Upon a sufficient showing by an applicant for a lode within the limits of a patented town site, a hearing will be ordered to determine whether or not the lode was known to be valuable for mineral at date of townsite entry, with a view to the recommendation of suit to vacate the town site patent to the extent of the conflict, if such issue be decided in the affirmative. Thomas J. Laney, 9 L. D. 88; Plymouth Lode, 12 L. D. 513; Protector Lode, 12 L. D. 662; Pacific Slope, 12 L. D. 686; Cameron Lode, 13 L. D. 369.

174. If the owner of a lode claim within a patented town site secures a reconveyance of the conflict to the United States, he may show by affidavits the known existence of the lode at date of the town site entry, without going to a hearing for that purpose, as there could be no other party to such a hearing. Com'r to Denver Office, July 10, 1896, *In re* Dump Lode.

175. Where the applicant for patent for a lode claim situated within a patented town site shows such lode to have been known at the date of the town site entry, he may procure a reconveyance of the conflict by the town site to the United States, and thus reinvest the Land Department with jurisdiction to patent the claim. Pederson Lode v. Black Hawk Town Site, 14 L. D. 186.

176. A mining claim was worked until 1869, and was then abandoned. A town site patent issued in 1869 covering the claim. The claim was located subsequently, in 1884. *Held*, that the claim was not such a mine as would be excepted from the town site patent. Richards v. Dower, 151 U. S. 658; 81 Cal. 44; 22 Pac. Rep. 304.

177. To be reserved from entry under the town site laws, land must, at date of such entry, (1) be covered by a valid mining claim, and (2) be known to be valuable for mineral. Duffy Quartz Mine, 18 L. D. 259.

178. When application for patent is made for a lode claim embraced within a patented town site, the town site claimants should protect any rights they may have by filing an adverse claim and securing a judicial determination thereof. If they fail so to do the United States will not bring suit to vacate the lode patent. Smoke House Lode, Butte City, 4 L. D. 555.

179. The Land Department in issuing a mineral patent should insert therein only terms of conveyance and a recital of compliance with the law. Deffeback v. Hawke, 115 U. S. 392; W. A. Simmons, 7 L. D. 283; Antediluvian Lode, 8 L. D. 602.

180. A lode to be excepted from a town site patent need not have been located at date of town site entry. It is excepted if known. Dower v. Richards, 73 Cal. 477; 15 Pac. Rep. 105.

181. A lode is located, but the location certificate is defective for uncertainty. A town site entry is then made. Then the location is amended. Two patents are issued. *Held*, that the location, being invalid, might not be amended after the intervention of adverse town site rights. Tombstone Town Site Case, 15 Pac. Rep. 26.

182. A town lot may be the subject of an adverse claim to land embraced within an application for patent for a lode claim. Papina v. Alderson, 10 C. L. O. 52.

183. It is no objection to the issuance of a patent for a lode claim that an application has been made for a town site embracing the ground, as mines cannot be acquired under the town site laws. South Comstock G. & S. M. Co., 2 C. L. O. 146.

(8) Agricultural Claim.

(See AGRICULTURAL CLAIM, p. 376.)

184. To be excepted from an agricultural patent, land must have been known to be more valuable for mineral than for agricultural purposes at date of agricultural entry. The development of mineral after such entry is immaterial. United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486; Boggs v. Merced M. Co., 14 Cal. 380; 10 Mor. Min. Rep. 334; Hunt v. Steese, 75 Cal. 620; 17 Pac. Rep. 920.

185. One who applies for a patent for a lode claim situated in a school section may be allowed to show that the land was known to be mineral in character at the date of the admission of the state, and hence excepted from the grant to the state. Fleetwood Lode, 12 L. D. 604.

186. "A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof

it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not "known mines," capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed." Colorado Coal & Iron Co. v. United States, 123 U. S. 307.

(9) Survey.

(See SURVEY, p. 137.)

187. The plat of survey of a lode claim must show all conflicts, and, unless such conflicts are shown, the survey should not be approved. Grand Dipper Dode, 10 C. L. O. 240.

188. The survey of a lode claim may be in the form of a triangle only when the presence of adjoining claims renders it necessary and when it is shown that the lode runs into the point of the angle. Fred. C. Morse, 5 C. L. O. 178.

189. The lines of a survey must necessarily conform to the course of the vein and not to congressional surveys. Reynolds v. Iron Silver M. Co., 116 U. S. 687.

(10) Cross Lodes.

(See CROSS VEINS, p. 354.)

190. Where two veins intersect, the prior locator takes the ore at the intersection, but the subsequent locator has a right of way through. Pardee v. Murray, 4 Mont. 234; 2 Pac. Rep. 16; 15 Mor. Min. Rep. 515.

191. Section 2336 was not intended to limit or define the rights of a person in mere possession of a tract of mining ground where there is more than one vein, or to prescribe the effect of a conveyance by the locator of a claim of a portion of his location containing one of such veins. The objects of the statute were to supplement the provision of section 2322, and to prescribe rules under which different locations by different proprietors should be held, and to determine the rights of such proprietors in case of intersecting veins. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98. (Is another trial of S. C., 96 Cal. 33; 30 Pac. Rep. 889.)

(11) Strike.

(See SURVEY, p. 137.)

192. A vein need not necessarily crop out on the surface in order that a location may be properly laid upon it; but where the vein does crop out along the surface, or is slightly covered by foreign matter, so that the course of the apex can be readily ascertained, this course should be substantially followed in laying claims and locations upon it. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

193. The location should be made along the strike of the vein. Patterson v. Hitchcock, 3 Colo. 523; 5 Mor. Min. Rep. 542.

194. A location of a mining claim upon a lode or vein of ore should be laid along the same, lengthwise of the course of its apex, as well under the mining act of 1866 as under that of 1872. If located otherwise, the location will only secure so much of the lode or vein as it actually covers. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

195. If the lode leaves the location at a point on a side line, the right to follow it on its strike ceases at the point of intersection of the lode with the side line. Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282; Johnson v. Buell, 4 Colo. 557; 9 Mor. Min. Rep. 502; McCornick v. Varnes, 2 Utah, 355; 9 Mor. Min. 505.

(12) End and Side Lines.

196. Extra-lateral rights of a patentee depend upon the actual course and position of the vein; not on the course and position indicated on the patent survey. Consolidated Wyoming Co. v. Champion M. Co., 63 Fed. Rep. 540.

197. The statutory direction that the end lines of a lode claim must be parallel should be followed as a rule, but under peculiar circumstances an exception to the rule may be allowed. Wilson H. Henry (Sterling Price Lode), 10 C. L. O. 102.

198. The law contemplates a location to be made nearly parallel with the line of the vein, and if a locator knowing the line of the vein, and wilfully and with fraudulent purpose, locate his claim in disregard of such line and course of the vein, and establish its length, not along the vein, but across it to an excess of several hundred feet or more be-

yond the three hundred feet limit allowed by Congress, for the fraudulent purpose of gaining and appropriating such excess of surface ground as his mining claim, this would be in deliberate violation of law, and the locator could gain no rights whatever thereby, but his location would be absolutely null and void, and he would be in the same position as if a location had never been attempted to be made. Walsh v. Mueller, 16 Mont. 180.

199. Where a lode leaves a claim through a side line, for the purpose of ascertaining and defining the right of the owner to follow the lode on its dip under section 2322, United States Revised Statutes, an end line should be drawn through the side line at the point of departure, parallel to the original end lines. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607; Iron Silver M. Co. v. Elgin M. & Sm. Co., 118 U. S. 196; 15 Mor. Min. Rep. 641; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478; Tyler M. Co. v. Last Chance M. Co., 157 U. S. 683. See 9 U. S. App. 613; 71 Fed. Rep. 848; Fitzgerald v. Clark, 157 U. S. 696; 42 Pac. Rep. 273; Colorado Central Cons. M. Co. v. Turck, 4 U. S. App. 290; 12 U. S. App. 85; 50 Fed. Rep. 888; Tyler M. Co. v. Sweeney, 4 U. S. App. 329; 54 Fed. Rep. 284; Last Chance M. Co. v. Tyler M. Co., 7 U. S. App. 463; 54 Fed. Rep. 284; 61 Fed. Rep. 557: Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557. See Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Law Rep. 304; Consolidated Wyoming Co. v. Champion M. Co., 63 Fed. Rep. 540; Del Monte M. & M. Co. v. New York & Last Chance M. Co., 66 Fed. Rep. 212; Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597; Wilhelm v. Sylvester, 101 Cal. 358; 35 Pac. Rep. 997; Tombstone M. & M. Co. v. Way Up M. Co., 24 Pac. Rep. 794; Watervale M. Co. v. Leach, 33 Pac. Rep. 418.

200. But where the claim is located across instead of along the lode, the side lines will be treated as end lines. King v. Amy & Silversmith M. Co., 152 U. S. 222; Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683.

201. A lode mining claim should be so surveyed as to leave no doubt as to which lines are to be considered as the end lines of the claim. Com'r to Surveyor-General of New Mexico, *In re* Sterling Price Lode, 10 C. L. O. 86.

202. Extra-lateral rights to work a lode other than the one specifically located are governed by the end lines as located, in the same manner as the extra-lateral rights to work the lode located. Walrath v. Champion M. Co., 63 Fed. Rep. 552.

203. "Under the act of 1866 (14 Stat. 251), parallelism in the end lines of a surface location was not required; but where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines. His lateral right by the statute is confined to such portion of the vein as lies between such planes drawn through the end lines and extended in their own direction; that is, between parallel vertical planes. It can embrace no other portion." Iron Silver M. Co. v. Elgin M. & Sm. Co. (Horseshoe Case), 118 U. S. 196; 15 Mor. Min. Rep. 641.

204. Non-parallelism of the end lines will not defeat the right of the locator on the apex of a lode to follow the lode on its dip, if the end lines converge in the direction of the dip, as the non-parallelism in that case would only operate to restrict the rights of the claimant. Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597.

205. For the purpose of including ground claimed under a lode location valid when made, and any veins or lodes the tops or apexes of which may be situated thereon, the end line of the lode claim may be established within a patented placer claim under the same principle as is laid down in paragraphs 50 and 51 of the Mining Circular, for conflicting lode claims. Black Diamond Lode, 22 L. D. 284.

206. Where a mining claim is located across a vein or lode instead of along it, those lines of the claim are side lines which in their length show the length claimed along the vein or lode, and those lines of the claim intersected by the lode on its course or strike are the end lines. Argentine M. Co. v. Terrible M. Co., 122 U. S. 478. See case of Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

207. If a lode departs from the side line of a claim, the claimant may voluntarily abandon his claim beyond the point of such departure and establish an end line at that point. Last Chance M. Co. v. Tyler M. Co., 15 U. S. App. 456. See 157 U. S. 683.

(13) Apex and Dip.

(See SURVEY, p. 137.)

208. The apex of a vein is that end which approaches nearest the surface, but is not the highest part of a roll or swell of mineral matter. Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557. See Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Rep. 304.

209. The apex of a vein is not necessarily a point. It may be a line of great length, and, if any part be within the location, the location is valid. Larkin v. Upton, 144 U. S. 19.

210. Issuance of a lode patent is conclusive proof that the claim is located on the apex of a vein. Iron Silver M. Co. v. Campbell, 17 Colo. 267; 29 Pac. Rep. 518. See 135 U. S. 286.

211. Under the law prior to 1872, the locator was entitled to but one vein. After the act of 1872 he was entitled to all veins having their tops or apexes within his surface lines. Blake v. Butte S. M. Co., 2 Utah, 54; 9 Mor. Min. Rep. 503.

212. Although the act of 1872 enlarges the right of a locator by a grant of all veins, lodes and ledges the top or apex of which lie within his surface lines, his right to surface ground and to other lodes is dependent upon the principal lode, the one forming the basis of the location. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

213. In an action to quiet title to a vein or lode, it is sufficient to describe such lode by its name if the lot or mining claim in which it has its apex is specifically described in the complaint. Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 3; 11 Pac. Rep. 515.

214. The lode or vein "which may thus be possessed and enjoyed outside of the limits of the surface side lines extended vertically must be the same vein or lode on the apex or outcrop of which the claim of the party has been located." Iron Silver M. Co. v. Cheesman, 116 U. S. 529. See 2 McCrary, 191; 9 Mor. Min. Rep. 552.

215. Where a vein outcrops in two mining claims, the first locator has the better right. Argentine M. Co. v. Terrible M. Co., 122 U. S. 478. See Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

216. A location, properly made, gives the locator the right to the vein upon which the location is based, and to all other veins having their apexes in the location, with the right to follow the same on the dip between perpendicular planes passed through parallel end lines. Iron Silver M. Co. v. Cheesman, 2 McCrary, 191; 9 Mor. Min. Rep. 552; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Pardee v. Murray, 4 Mont. 284; 2 Pac. Rep. 16; 15 Mor. Min. Rep. 515.

217. A patent includes all veins having their tops or apexes within the surface patented. Iron Silver M. Co. v. Cheesman, 2 McCrary, 191; 9 Mor. Min. Rep. 552.

218. A claimant does not own any veins the apexes of which are outside of his claim. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

219. The locator who has a vein extending through his claim owns all other veins whose apexes are within his claim, and may adverse an application for a conflicting claim located on one of such other veins. Freeland v. Hoffman, 13 Mor. Min. Rep. 289.

220. One owing a lode claim is presumed to own all mineral therein until some one else shows good title thereto by virtue of a location on the apex of a lode dipping under the claim. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

221. Surface ground is not given a locator simply for working of the particular lode located, but to give him all other veins the apexes of which are found in the location. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed in 6 Colo. 581; 15 Mor. Min. Rep. 458.)

222. The owner of a mining claim is *prima facie* owner of all minerals inside his surface lines; but if evidence is introduced going to show that the vein in controversy has its apex outside of the claim, he must prove his right to it by proving its apex to be inside. Jones v. Prospect Mtn. T. Co., 21 Nev. 359; 31 Pac. Rep. 642; Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. Rep. 540. (Refusing to follow Bell v. Skillicorn, 28 Pac. Rep. 768.)

223. "The ownership of or title to a vein is determined by its top or apex; and although one may discover a vein within the limits of the ground claimed, yet if the top or apex of such vein lies without his claim, he will acquire no right thereto." Larkin v. Upton, 7

Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; 5 Mont. 600; 6 Pac. Rep. 66.

224. All lodes (including cross lodes) the apexes of which are found in a lode location belong to the locator, subject to prior acquired rights. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

225. Ordinarily the dip of a lode is practically at right angles to the strike. Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662; 23 Pac. Rep. 547.

226. The fact that a lode is nearly horizontal (a blanket lode) does not defeat the right of a locator of the apex to follow it outside his claim on the dip, even though the dip be slight. Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557; Leadville M. Co. v. Fitzgerald, 4 Mor. Min. Rep. 380. See Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Rep. 304.

227. One following a vein in its dip into the claim of another need only show the apex to be outside of such claim to defeat a suit by the owner of the same. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

228. The burden is upon one who asserts the right to follow a lode on its dip into the claim of another to show that he has a valid location on the apex of the lode. Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662; 23 Pac. Rep. 577; Iron Silver M. Co. v. Campbell, 17 Colo. 267; 29 Pac. Rep. 513. (See 135 U. S. 286.) Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Rep. 304. (See Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557.)

229. The right to follow a lode on its dip rests on the ability to show a continuous body of ore from the apex on which the location is made to the ground in controversy. Hyman v. Wheeler, 29 Fed. Rep. 347; 15 Mor. Min. Rep. 519.

230. When a vein located on the apex passes on the dip outside the plane of the side lines extended vertically, and encroaches on another's vein, it must be shown that the vein passing outside the side lines is a continuation of the vein located, in order to give the right to pursue it. Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

231. One claiming the right to follow a lode outside of his claim must show the same to be a continuous streak of quartz, ore or vein matter, not merely an indication such as a miner would follow with the expectation of finding ore. Fitzgerald v. Clark, 157 U. S. 696. See 17 Mont. 100; 42 Pac. Rep. 273.

232. A miner has no right to follow a lode on its dip into the claim of another unless he has the apex of the lode in his claim. Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662; 23 Pac. Rep. 547.

233. A locator working subterraneously into the dip of a vein belonging to another locator, who is in possession of his location, is a trespasser, and is liable to an action for ore taken therefrom. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

234. Each locator is entitled to follow the dip of his lode or vein to an indefinite depth, though it carries him outside of the side lines of his location; but this right is based on the hypothesis that the side lines substantially correspond with the course of the lode or vein at the surface; and it is bounded at each end by the end lines of the location crossing the lode or vein, and extended perpendicularly downward indefinitely in their own direction. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

235. In a controversy as to the ownership of the vein on the dip, the issuance of patent does not prove the correctness of the Land Department record as to the date of location, but this must be proven as any other matter would be. Last Chance M. Co. v. Tyler M. Co., 9 U. S. App. 613; 61 Fed. Rep. 557; Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645; Champion M. Co. v. Cons. Wyoming G. M. Co., 75 Cal. 78; 16 Pac. Rep. 513.

236. A mining claimant may follow his lode on its dip, even though it dip under a claim held by a senior patent. Colorado Central Cons. M. Co. v. Turck, 4 U. S. App. 290; 50 Fed. Rep. 888; 12 U. S. App. 85.

237. Where two veins, each located and owned by the same person, unite on the dip, the lode below the point of union goes with the title to the senior location; and if below that point it unites with still another lode, the point to decide would be, which was first, the senior location of the first party, or the location of such other lode. Little Josephine M. Co. v. Fullerton, 19 U. S. App. 190; 58 Fed. Rep. 521.

238. The prior locator takes the lode below the point of union with another vein on

the dip. Champion M. Co. v. Cons. Wyoming G. M. Co., 75 Cal. 78; 16 Pac. Rep. 513.

239. When the owner of a lode claim sells a part of his location, section 2336, United States Revised Statutes, does not apply in deciding the respective rights of the grantor and the grantee, but the grantee takes, absolutely, *all* of every vein the apex of which is in the granted premises, as against the grantor, though they may be intersected on the dip by a vein covered by a prior location of the grantor. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98; S. C., 96 Cal. 33; 30 Pac. Rep. 889.

240. The locator of a lode has no right to work another lode which dips under his claim, without regard to whether or not the right to work it belongs to any other person. Montana Co. v. Clark, 42 Fed. Rep. 626.

241. An adverse claim which alleges no surface conflict of claims will not be received as such, as the relative rights of the parties to work a lode on its dip must be determined by the courts. New York Hill Co. v. Rocky Bar Co., 6 L. D. 318.

242. The identity of the vein outside of the side lines with that inside the lines is essential to the possession and pursuit thereof outside such lines. So long as the inclosing walls can be distinctly and continuously traced, and the mineral matter of the same character found between them, there can be no doubt that it is the same vein; but if the mineral disappears, or the fissure with its walls of the same rock disappears, the identity can no longer be traced. Then the right to follow the vein outside the perpendicular lines of the survey is lost. Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

243. Section 2322, United States Revised Statutes, gives to the owner of the apex of a vein or lode, not only all that is covered by the surface lines of his claim as those lines are extended vertically, but it gives him the right to possess and enjoy the lode or vein by following it on the dip when it passes outside of those vertical lines laterally. Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

244. In an action of ejectment, plaintiff (senior locator) alleged a union of veins on the dip, and claimed all below the point of union, while defendant alleged that the veins crossed each other on the dip. *Held*, that if a general verdict is given for defendant, plaintiff has lost his right to the vein at the point of intersection by failing to ask proper instructions to protect his right thereto. Little Josephine M. Co. v. Fullerton, 19 U. S. App. 190; 58 Fed. Rep. 521.

245. A plaintiff who sues a defendant for taking ore from the plaintiff's claim has the burden of proving that the vein worked by the defendant has its apex in the plaintiff's claim if that fact is denied by the defendant. Jones v. Prospect Mtn. T. Co., 21 Nev. 339; 31 Pac. Rep. 642. (Refusing to follow Bell v. Skillicorn, 28 Pac. Rep. 768.)

(14) Placer.

(See PLACER, p. 321.)

246. The location of a claim, whether as lode or placer, depends on the geological formation of the deposit. This question is one for the locator to decide. Com'r to H. D. Converse, Dec. 24, 1892.

247. To be excepted from a placer patent, a lode need not have been located at date of the application for such patent. "It is enough that it be known; and, in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises," etc. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591; Iron Silver M. Co. v. Reynolds, 124 U. S. 374; Noyes v. Mantle, 127 U. S. 348; Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394; Sullivan v. Iron Silver M. Co., 143 U. S. 431.

248. Proof of the location of a lode claim in a placer at the date of placer application for patent is not proof of the known existence of the lode. Butte & Boston M. Co. v. Sloan, 16 Mont. 97; 40 Pac. Rep. 217.

249. The legal location of a placer mining claim will not prevent the location of lode claims therein by other persons at any time previous to application for patent for the placer. Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 L. D. 95.

250. A patent for a lode claim which is situated within the boundaries of a placer claim covered by a prior patent is not conclusive of the fact that the lode so patented was known to exist at date of the application for the placer patent, and hence ex-

cepted from the placer patent. Iron Silver M. Co. v. Campbell, 135 U. S. 286. See 17 Colo. 267; 29 Pac. Rep. 513.

251. An applicant for a placer patent who has given due notice thereof and made entry may maintain a suit to quiet title against one claiming under a conflicting lode location. Dahl v. Raunheim, 132 U. S. 260.

252. A lode is known to exist when located. Mantle v. Noyes, 127 U. S. 348; 15 Mor. Min. Rep. 611; S. C., 5 Mont. 274; 5 Pac. Rep. 856; Silver Bow M. & M. Co. v. Clarke, 5 Mont. 378; 5 Pac. Rep. 574.

253. The formal location of a lode is not necessary to exclude it from a placer patent, the only requisite to such exclusion by operation of law being (1) that it was known to exist at date of application for the placer patent, and (2) that it was not included in such application. Railroad Lode v. Noyes Placer, 9 L. D. 26.

254. A known lode, to be excepted from a placer patent, must have been located at date of placer application. Iron Silver M. Co. v. Sullivan, 5 McCrary, 274; 16 Fed. Rep. 829. (Reversed in Sullivan v. Iron Silver M. Co., 143 U. S. 431.)

255. A lode is not known to exist until it has been located according to law and its boundaries marked on the surface. Duffy Quartz Mine, 18 L. D. 259. See Railroad Lode v. Noyes Placer, 9 L. D. 26.

256. "Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode." Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

257. Where a vein or lode is known to exist under the surface included in a placer patent, and is not in a placer claimant's possession, and not mentioned in the claim on which the patent issues, the title to such vein or lode remains in the United States, unless previously conveyed to some one else, and does not pass to the placer patentee, who thereby acquires no interest in such vein or lode. Reynolds v. Iron Silver M. Co., 116 U. S. 687.

258. If a lode is known at date of application for a placer patent, it does not pass to the patentee and he cannot disturb one in possession, even though the third person be a mere intruder. Reynolds v. Iron Silver M. Co., 116 U. S. 687.

259. A lode known to exist at date of application for a placer patent, "however insignificant in value," is excepted from the placer application. Becker v. Sears, 1 L. D. 577.

260. A lode within a placer claim, known at date of application for placer patent, is carved out of the patent. Dahl v. Raunheim, 132 U. S. 260. See 6 Mont. 167; 9 Pac. Rep. 892.

261. A lode within the limits of a patented placer claim, to be excepted from the placer patent, must have been known to exist at date of the application for the placer patent. Mere belief in the existence of the lode is not knowledge thereof. Iron Silver M. Co. v. Reynolds, 124 U. S. 374. (S. C., 116 U. S. 687, first trial.) United States v. Iron Silver M. Co., 128 U. S. 673; War Dance Lode v. Church Placer, 1 L. D. 549.

262. A vein or lode known at date of application for placer patent is excepted from the placer patent. "The second matter is this: Was there a known vein at the time of the application for a patent within the meaning of section 2333. It was not then a located vein or lode, and the case was evidently tried by the plaintiff upon the theory that unless it was a located vein it was not a known vein; but that, as we have seen, is not a correct interpretation of the statute. It is enough that it is known; and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent, or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises," etc. Iron Silver M. Co. v. Mike & Starr Mining Co., 143 U. S. 394.

263. A vein or lode that has never been claimed, that has not been located, that has not been marked out by metes and bounds, and in which there has been no actual development, is not excepted from a placer

application and patent. Iron Silver M. Co. v. Sullivan, 5 McCrary, 274; 16 Fed. Rep. 829. (Ruling reversed as to this point. S. C., 143 U. S. 431.)

264. To be excepted from a placer application for patent, a lode must have been known to be valuable for mineral at date of such application. Largey v. Black, 10 L. D. 156.

265. An applicant for a patent for a lode within a patented placer claim must show affirmatively the existence of such mine and its true location and prove its possessory right and value of work performed. Moyer v. Mike & Starr G. & S. M. Co., 10 C. L. O. 150.

266. A lode, to be excepted from a placer patent, must have been known to be valuable enough to justify exploitation at date of application for placer patent. Brownfield v. Bier, 15 Mont. 403; 29 Pac. Rep. 461.

267. "It is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account and justify their exploitation." United States v. Iron Silver M. Co., 128 U. S. 673. (Affirming 24 Fed. Rep. 568; approved in Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394.)

268. Mere belief in the existence of a vein is not knowledge thereof. Sullivan v. Iron Silver M. Co., 143 U. S. 431.

269. A known vein, to be excepted from a placer patent, must possess qualities not required to render a vein subject to location under section 2320, United States Revised Statutes; *i. e.*, it must be capable of being profitably worked. Montana Central Ry. Co. v. Migeon, 68 Fed. Rep. 811.

270. The existence of a known lode is a question of fact for the jury. "It cannot be said, as a matter of law in advance, how much gold or silver must be found in a vein before it will justify exploitation and be properly called a known vein." Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394.

271. Mere belief not based on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore, which might be merely parts of a single vein of continuous extension through all that territory, is not knowledge required by section 2333, United States Revised Statutes, of a known lode. Sullivan v. Iron Silver M. Co., 143 U. S. 431.

272. A patent to a placer, under section 2333, United States Revised Statutes, passes no title to a previously located lode within its boundaries. Whether or not the placer applicant knew of its existence is immaterial. Mantle v. Noyes, 5 Mont. 274; 5 Pac. Rep. 856; S. C., 127 U. S. 348.

273. Section 2333, United States Revised Statutes, carves out of a placer patent all lodes known to exist within the placer at date of application therefor, with twenty-five feet of surface ground on each side. Becker v. Sears, 1 L. D. 577.

274. Section 2333, United States Revised Statutes, provides that known lodes within a placer, not applied for by the placer applicant, are excepted from the placer patent. Clary v. Hazlitt, 67 Cal. 286; 7 Pac. Rep. 701.

275. A placer patent conveys to the placer patentee full title to all lodes or veins within the territorial limits not then known to exist. Nothing disclosed after the issuance of patent can limit the effect of the patent or except from its scope any vein or lode not so known. Sullivan v. Iron Silver M. Co., 143 U. S. 431; Montana Copper Co. v. Dahl, 6 Mont. 131; 9 Pac. Rep. 894; Raunheim v. Dahl, 132 U. S. 260; 6 Mont. 167; 9 Pac. Rep. 892; Maggie Lode, 14 L. D. 655.

276. Where a vein or lode is known to exist under the surface included in a placer patent, and is not in a placer claimant's possession, and not mentioned in the claim on which the patent issues, the title to such vein or lode remains in the United States, unless previously conveyed to someone else; and does not pass to the placer patentee, who thereby acquires no interest in such vein or lode. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

277. The title to all veins or lodes within a placer claim known to exist at date of the placer application for patent and not included in such application remains in the United States, and the placer patentee or his grantee has no right to dispossess any one in the

peaceable possession of such vein or lode, whether the latter has any title or not. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

278. The fact that a placer patent was obtained with the intention of acquiring title to lodes supposed to exist within the placer claim, but as yet undiscovered, will not defeat the title of the placer patentee. Iron Silver M. Co. v. Reynolds, 124 U. S. 374. (S. C., 116 U. S. 687, first trial.)

279. Non-contiguous portions of a lode claim intersected by a patented placer cannot be patented together. Com'r to Surveyor-General of Colorado, April 23, 1891, *In re* Gomer & Pittsburgh Lodes.

280. Locations of lodes or veins within placer claims, prior to application for placer patent, when perfected under the law, are the property of the locators or their assigns, and are not, therefore, subject to disposal by the government. Sullivan v. Iron Silver M. Co., 143 U. S. 431. (Citing and quoting Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510.)

281. The statutes of Montana requiring a record of location of a vein mining claim cannot be construed to include a placer claim. The record was therefore no part of the chain of title to a placer claim, and hence was immaterial. Moxon v. Wilkinson, 2 Mont. 421; 12 Mor. Min. Rep. 602.

282. In assuming to issue patent for a lode claim alleged to have been known at the date of application for a placer patent (since issued) covering the land, the department will proceed with caution and will require the known existence of such lode, at that date, to be clearly shown. Departmental decision of May 13, 1896, *In re* Lucy L. Lode.

283. Section 2333, United States Revised Statutes, has no application to a legally located vein or lode within the boundaries of a placer claim. Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

284. Section 2333, United States Revised Statutes, applies only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for patent for a placer claim must include them in his application or he will be deemed to have declared that he had no right to them. Sullivan v. Iron Silver M. Co., 143 U. S. 431. See S. C., 109 U. S. 550.

285. Section 2333, United States Revised Statutes, has no application to lodes or veins within the boundaries of a placer claim which have been legally located previous to the application for the placer patent, and which are in the possession of the locators or their assigns at the date of said application. Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611; Sullivan v. Iron S. M. Co., 143 U. S. 431.

286. The limitation of the width of a lode claim within a placer, prescribed by section 2333, United States Revised Statutes, does not apply where the lode was covered by a valid location of the full extent allowed by law, prior to the application for placer patent, but in such a case the entire lode *claim* is excepted from the placer patent. Pike's Peak Lode, 10 L. D. 200. (Overruling Shonbar Lode, 1 L. D. 551; 3 L. D. 388.) See, also, South Star Lode, 20 L. D. 204.

287. Where it appears to the satisfaction of the Land Department that a lode was known at date of application for placer patent, the lode, with surface ground twenty-five feet on each side, may be patented, notwithstanding the issuance of the placer patent. Shonbar Lode, 1 L. D. 551; 3 L. D. 388. See Pike's Peak Lode, 10 L. D. 200; and South Star Lode, 20 L. D. 204.

288. The discovery, subsequent to application for a placer patent, of veins or lodes within the limits of the placer claim does not affect the rights of the placer applicant. United States v. Iron Silver M. Co., 128 U. S. 673.

289. One who locates a lode within a placer claim after publication of notice of placer application acquires no right to it, and (*semble*) he does not acquire any right if the location is made after placer application. Montana Copper Co. v. Dahl, 6 Mont. 131; 9 Pac. Rep. 894.

290. After issuance of a placer patent the owner of a lode therein. located with surface ground twenty-five feet in width on each side, may not so amend his location as to take in a greater amount of surface ground. Becker v. Sears, 1 L. D. 577.

291. The entry as a placer claim of land known to be valuable only for lodes contained is illegal, and will be canceled. Grosfield v. Nigger Hill Cons. M. Co., 14 L. D. 685.

292. The owner of a lode alleged to have been known at date of application for patent

to a placer (since patented) covering the lode, should apply for patent in the usual manner and allow the placer patentee to adverse should he desire. Olathe Placer, 4 L. D. 494.

293. The issuance of a placer patent will not preclude the issuance of patent for a lode claim situate within the placer and known at date of application for the placer patent. Robinson v. Roydor, 1 L. D. 564.

294. Where a lode claim conflicts with a placer, the lode discovery being outside of the conflict, there is no presumption of continuation of the lode into the placer ground. (Raunheim, placer claimant, filed application for patent, and gave notice. Dahl, lode claimant, did not adverse. Hence Dahl is estopped from questioning the validity of the placer claim.) Raunheim v. Dahl, 6 Mont. 167; 9 Pac. Rep. 892; 132 U. S. 260.

295. "Generally, when a ledge has been traced for such a distance, in a claim for this size, it would not be an unreasonable presumption that it would continue in the same direction far enough to cross the end lines of the claim." Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597.

296. In procuring a patent for a placer claim under section 2333, United States Revised Statutes, where the claimant is also in possession of a lode or vein included within the boundaries of his placer claim, the patent shall cover both, if he makes this known and pays $5 per acre for twenty-five feet on each side of his vein, and $2.50 per acre for the remainder of his placer claim. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

297. After the issuance of a placer patent the Land Department will not assume that a lode was known to exist within the placer claim because of the fact that a lode claim was located therein prior to the placer application. The known existence of the lode at that date must be shown as a fact, by proof. Valley Lode, 22 L. D. 317.

298. A judicial award of the right of possession to an adverse placer claimant as against the applicant for patent for a lode claim does not preclude inquiry by the Land Department on an allegation of the lode claimant that the placer claim, as subsequently applied for, embraces a known lode, where it appears that the question was not tried on the adverse suit; and if such allegation is sustained, the lode claimant may make entry of his lode together with surface ground necessary to the convenient working thereof. Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 L. D. 95.

299. Where entry is made of a lode claim in conflict with a patented placer claim, and it appears that the title under the placer patent, to the ground in conflict, is vested in the lode claimant, the known existence of the lode at date of the application for the placer patent may be shown by *ex parte* affidavits, as there could be no opposing party to render a hearing necessary. Valley Lode, 22 L. D. 713.

300. The entry of a lode claim conflicting with a patented placer may be suspended to allow the lode claimant opportunity to show at a hearing that the lode was known at date of placer application, with view to the recommendation of suit to vacate the patent for the placer claim. Rebel Lode, 12 L. D. 683. (Modified in South Star Lode, 20 L. D. 204.)

301. Where an applicant for a lode patent shows the lode to have been known at the date of application for the patented placer, with which it conflicts, instead of incurring the expense of a suit by the United States to vacate the placer patent as to the conflict, the Land Department may accept a reconveyance of the land to the United States, which would re-invest the Department with jurisdiction over it. Juniata Lode, 13 L. D. 715.

302. Where it is ascertained by inquiry instituted by the Department, or determined by a court of competent jurisdiction, that a lode claim exists within the boundaries of land covered by a placer patent, and that such lode claim was known to exist at the date of application for such patent and was not applied for, it must be held that the land embraced in said lode claim is reserved from the operation of the conveyance by the general terms of exception therein, and that patent may issue therefor, if the law has been in other respects complied with. Case of Pike's Peak Lode, 14 L. D. 47. (Overruled, South Star Lode (review), 20 L. D. 204.)

303. On a sufficient showing by the applicant for a lode claim situated in a patented placer, a hearing may be ordered to determine whether the lode was known at the date of the placer application, with the view of recommending suit by the United States Attorney General to vacate the placer patent as to

the conflict. Pike's Peak Lode, 14 L. D. 47. (Modified by South Star Lode, 20 L. D. 204.)

304. An application for a lode claim in conflict with a patented placer may not be received by the Land Department as long as the placer patent remains outstanding. If the placer patent was issued upon false proofs, suit to vacate the same should be brought by the United States. Pike's Peak Lode, 10 L. D. 200. (Overruled by South Star Lode Case, 20 L. D. 204.)

305. The decision of the Department, *In re* Juniata Lode, 13 L. D. 715 (wherein the Department consented to accept a reconveyance of the part of a patented placer claim covered by a lode location, for the purpose of issuing patent for the lode claim without suit to vacate the placer patent), is not applicable where it is desired to allow a lode patentee to reconvey a tract for the purpose of giving an unpatented lode claim its discovery. Winter Lode, 22 L. D. 302.

306. A judgment rendered on an adverse suit, awarding the surface of the ground involved to a placer claimant, and lodes therein contained to lode claimants, is without authority of law, and will not be followed by the Land Department, which will not issue a patent for a placer claim containing known lodes belonging to one other than the placer claimant. Apple Blossom Placer v. Cora Lee Lode, 14 L. D. 641.

307. The validity of a placer patent and its extent, as to conflict with a lode alleged to have been known at date of application for the placer patent, are questions that may be determined only by the courts. Pike's Peak Lode, 10 L. D. 200. (Overruled in South Star Lode Case, 20 L. D. 204.)

308. The question of whether or not a lode was known to exist within a placer claim at date of the application for placer patent is always one for an ultimate decision by the courts. After the Land Department has issued a patent for the placer claim, its jurisdiction over the land patented has ceased, and the only way the title of the patentee can be impeached is by proper proceedings in court. Iron Silver M. Co. v. Campbell, 135 U. S. 286.

309. A placer patentee cannot be called upon to defend his title against a lode claimant before the Land Department. Iron Silver M. Co. v. Campbell, 135 U. S. 286.

310. In the case of a known lode in a placer claim at date of the placer application for patent, and not included in the placer application, the rule which applies to all actions to recover possession of real estate applies, namely, that the plaintiff can only recover on the strength of his own title, and not on the weakness of defendant's title. Reynolds v. Iron Silver M. Co., 116 U. S. 687.

311. In an action by the patentee of a placer claim to recover possession of a vein or lode within its boundaries, an answer alleging that the vein or lode was known to the patentee to exist at the time of applying for the patent, and was not included in the placer application, well pleads the fact which, under section 2338, United States Revised Statutes, precludes the patentee from having any right of possession of the vein or lode. Sullivan v. Iron S. M. Co., 109 U. S. 550.

312. The owner of a lode claim covered by an application for a placer patent is not obliged to adverse the placer application, for his claim is excepted from the operation of the placer patent by law. Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

313. Where an application for patent under the lode mining laws is made for land already patented to another under the placer mining laws, the provision of section 2326, United States Revised Statutes, does not require the placer patentee to adverse the application for the lode claimant, as only those holding mining claims by possessory title are required to proceed under that law. Iron Silver M. Co. v. Campbell, 135 U. S. 286.

314. A dispute between mining claimants, one claiming the land as a lode claim and the other as a placer claim, must be settled in court, as the determination of such controversies is not within the jurisdiction of the Land Department. Com'r to C. Dodson, April 10, 1891.

315. The locator of a lode claim who fails to adverse an application for a placer claim covering the same, by such failure loses his rights to surface ground in excess of twenty-five feet on each side of the middle of his lode. Shonbar Lode, 1 L. D. 551; 3 L. D. 388. (Modified in South Star Lode, 20 L. D. 204.)

316. Where application for a placer patent was made and no adverse claim filed by a lode claimant, and subsequently the lode claimant applied for patent and was adversed

by the placer applicant, who began suit and then dismissed it, it was held that the placer applicant had abandoned the conflict and that patent for the lode claim need not be confined to twenty-five feet on each side of the middle of the lode. Monroe Lode, 4 L. D. 273.

317. A placer claimant may file an adverse against the application for patent to a lode claim conflicting with the placer claim. Bennett v. Harkrader, 158 U. S. 441.

318. In Montana, suits are entertained, based on adverse claims filed by lode claimants against an application for a placer patent. Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287; Railroad Lode v. Noyes Placer, 9 L. D. 26.

319. The Colorado courts entertain adverse suits brought by lode claimants against placer applicants. Alice Placer, 4 L. D. 314.

320. Where a placer patentee has filed an adverse claim against the application for patent for a lode claim within the placer and has begun suit thereon, the Land Department will take no action, but will leave the parties to secure a determination of their rights in court. Iron Silver M. Co. v. Mike & Starr M. Co., 6 L. D. 533.

321. A placer applicant will not be allowed to amend his application for patent so as to embrace therein a lode discovered before the filing of such application, as the failure to embrace the same in the placer application in the first instance was, under the law, a conclusive waiver of all claims to the lode. Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 28 L. D. 95.

322. A mere intent to get a lode in a placer, if it be not known to exist, is immaterial. Iron Silver M. Co. v. Reynolds, 124 U. S. 374.

(15) General.

323. "A mining claim is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining laws, local and statutory. It must, under the law of congress of 1872 (Rev. Stat., sec. 2320), be located upon at least one known vein or lode, but the vein or lode is not the whole claim." Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

324. A lode claimant claiming a conflict with another lode claim must, to recover, show that his lode extends through the conflict. Zollars & Highland Chief Cons. M. Co. v. Evans, 2 McCrary, 39; 4 Mor. Min. Rep. 407; Van Zandt v. Argentine Mining Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

325. "When one has discovered a vein and has complied fully with the law in locating a claim thereon, the territory inclosed within his surface boundaries is segregated from the public domain in so far as all parties except the government, are concerned. . . . The prospector cannot go within such surface boundaries to prospect for mineral veins, and his act, if he do so, is as much trespass as though the land was patented." Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

326. "A person who makes a valid location of a mineral ledge or lode, and complies with the laws and the local mining rules in respect thereto, obtains a vested right to such property, of which he cannot be divested." Blake v. Butte S. M. Co., 2 Utah, 54; 9 Mor. Min. Rep. 503.

327. As claims located prior to 1872 were for one vein only, an application for a claim in conflict with another need not be adversed by the owner of such other claim to protect his rights, if such claims were located on different lodes. Blake v. Butte S. M. Co., 2 Utah, 54; 9 Mor. Min. Rep. 503.

328. The name by which a lode is conveyed is immaterial if the property may be identified from the description given in the deed. Lebanon M. Co. v. Cons. Republican Mtn. M. Co., 6 Colo. 380; Phillpotts v. Blasdell, 8 Nev. 61; 4 Mor. Min. Rep. 341.

329. The statutes of Montana which regulate the descent and distribution of real property are applicable to quartz lodes. Carhart v. Montana Mineral, etc., 1 Mont. 245.

330. In the absence of an adverse claim, it will be assumed that a lode exists in land entered as a lode claim on regular proof. Apple Blossom Placer v. Cora Lee Lode, 21 L. D. 438.

331. In the absence of a showing to the contrary, it is presumed that the patentee of a claim has the right to any lode inside of his surface lines. Iron Silver M. Co. v. Campbell, 17 Colo. 267; 29 Pac. Rep. 513. See 135 U. S. 286.

332. The locators of a vein or lode may not amend their location because of a change in the course of the vein located, so as to interfere with the vested rights of another location. O'Reilly v. Campbell, 116 U. S. 418.

333. A person in possession of a vein or lode can only be deprived of that possession by a superior title. Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

334. On an adverse suit, if the defendant shows a *prima facie* good location, the plaintiff must either show a better one, or that defendant's lode does not extend into the ground in conflict. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

335. The location of a vein or lode as running in a certain direction, not marked or developed for years but simply indicated by a notice, is invalid as against a claim subsequently located on ground different from that indicated, after the development of the latter claim without objection, although subsequent explorations by the first locators disclose the fact that their vein in its true course covers the subsequent claim. O'Reilly v. Campbell, 116 U. S. 418.

336. "Generally, when a ledge has been traced for such a distance, in a claim of this size, it would not be an unreasonable presumption that it would continue in the same direction far enough to cross the end lines of the claim." Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597.

3. *Minerals.*

337. *Those specifically named in the statute:* Gold, silver, cinnabar, lead, tin and copper. Copper and cinnabar are to be entered as lodes. Com'r to J. E. Morgan, Aug. 26, 1871; Sickel's Min. Dec. 523. Tin appears as a lode deposit. Grosfield v. Nigger Hill Cons. M. Co., 14 L. D. 685.

338. *Other valuable deposits:* The latest decision by the Land Department as to what constitutes mineral land within the purview of chapter 6 of title XXXII, United States Revised Statutes, is that contained in Commissioner's decision of October 2, 1896, *In re* Aldritt v. N. P. R. R. Co. (Bozeman, Mont., Land District), and holds in plain terms that, to be open to exploration and purchase under the mineral land laws, land must contain *metalliferous* minerals.

339. Whatever is recognized as mineral by the standard authorities, where the same occurs in quantity and quality to render the land in question more valuable on its account than for agricultural purposes, is mineral within the meaning of the mining laws. W. H. Hooper, 1 L. D. 560.

340. In addition to those named in the statute, the following minerals are enterable under the mineral land laws: Gypsum, limestone, asphaltum, borax, auriferous cement, fire-clay, kaolin, mica, marble, petroleum, slate and other valuable deposits which are recognized as mineral by standard authorities. Com'r to Bernard Snow, July 22, 1893.

341. Varieties of, considered. Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 9 Mor. Min. Rep. 578.

342. All minerals, except coal and iron, are excepted from grants to railroads. Com'r to W. A. Arnold, 2 C. L. O. 131.

Minerals in Michigan, Wisconsin and Minnesota excepted from the operation of the mineral laws.

The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the states of Michigan, Wisconsin and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any *bona fide* entries of such lands within the states named since the tenth of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands. 17 Stat. 465; sec. 2345, U. S. Rev. Stat.

Minerals in Missouri and Kansas excepted from the operation of the mineral laws.

AN ACT to exclude the states of Missouri and Kansas from the provisions of the act of congress entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the states of Missouri and Kansas deposits of coal, iron, lead, or other minerals be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two, and all lands in said states shall be subject to disposal as agricultural lands.

Approved May 5, 1876. (19 Stat. 52.)

Mineral lands in Alabama excepted from the operation of the mining laws.

AN ACT to exclude the public lands in Alabama from the operation of the laws relating to mineral lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the state of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided, however*, that all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale: *And provided further*, that any *bona fide* entry under the provisions of the homestead law of lands within said state heretofore made may be patented without reference to an act approved May tenth, eighteen hundred and seventy-two, entitled, "An act to promote the development of the mining resources of the United States," in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

Approved March 3, 1883. (22 Stat. 487.)

343. Mineral lands in Oklahoma Territory are excepted from the operation of the mining laws. Section 16 of act approved March 3, 1891 (26 Stat. 1026).

344. The term *mineral* "includes all fossil bodies or matters dug out of mines." Rosse v. Wainman, 14 M. & W. 859; McGlenn v. Wienbroeer, 15 L. D. 370.

Agate (Moss): Land containing, is mineral land if it is most valuable therefor. Com'r to P. M. Gill, Oct. 8, 1894.

Albertite (see *Asphaltum*): Is a mineral. Com'r to Secretary Noble, April 12, 1892.

Alkaline Earths: Are mineral. Regulation governing entry of, 1 L. D. 561.

Alum: Is a mineral. Downey v. Rogers, 2 L. D. 707; Circular, July 15, 1873, 1 C. L. O. 11. Regulations governing entry of, 1 L. D. 561.

Aluminium: Is too common a deposit to be considered a mineral patentable under the mineral land laws. Jordan v. Idaho Aluminium M. & Mfg. Co., 20 L. D. 500.

Amygdaloid Bands: Are mineral. Circular, July 15, 1873, 1 C. L. O. 11.

Asbestus: The General Land Office will express no opinion, in advance of the submission of an actual case, as to whether or not asbestus is a mineral. Com'r to P. F. Lull, May 19, 1893.

Asphaltum (see *Gilsonite* and *Albertite*): Is a mineral. (Placer.) Downey v. Rogers, 2 L. D. 707; Conlin v. Kelly, 12 L. D. 1; Circular, July 15, 1873, 1 C. L. O. 11: Maxwell v. Brierly, 10 C. L. O. 50; Com'r to H. Poole, Feb. 7, 1882. Regulations governing entry of, 1 L. D. 561.

Considered a mineral in New Brunswick. Gisner v. Gas Co., 1 Nova Scotia, 72; 2 Allen (N. B.), 595.

Auriferous Cement: Is mineral. (Placer.) Conlin v. Kelly, 12 L. D. 1; Maxwell v. Brierly, 10 C. L. O. 50; Com'r to T. N. Stoddard, Copp's Min. Lands, 83.

Auriferous Clay (see *Clay*): Is a mineral. (Placer.)

Bituminous Shale: The General Land Office will express no opinion in advance of the submission of an actual case requiring a decision. Definitions of shale. Com'r to O. P. Shakspeare, Aug. 7, 1893.

Black Lead (see *Graphite*).

Bog Iron (see *Iron*): Is not a mineral.

Borax, Carbonate of Soda, Nitrate of Soda, Sulphur, Alum, and Asphalt: Lands containing, to be enterable under the mineral land laws, must be affirmatively shown to be more valuable therefor than for agricultural purposes. Departmental Circular of Jan. 30, 1883, 1 L. D. 561. (Regulations governing entry of.)

Borax: Is a mineral. (Placer.) Downey v. Rogers, 2 L. D. 707; Conlin v. Kelly, 12 L. D. 1; Circular, July 15, 1873, 1 C. L. O. 11; Maxwell v. Brierly, 10 C. L. O. 50.

Brick Clay (see *Clay*).

Building Stone (see *Stone*).

Carbonate of Soda (see *Soda*).

Clay: Auriferous clay is a mineral. Maxwell v. Brierly, 10 C. L. O. 50.

Ordinary clay is not a mineral. Com'r to Helena office, Feb. 19, 1891, 18 C. L. O. 15.

Brick clay is not a mineral. Departmental decision of June 19, 1888, *In re* Blake Placer. S. C. on review, Jan. 17, 1889, Dunluce Placer, 6 L. D. 761.

Fire-clay — Kaolin, are minerals. (Placer.) Dobbs Placer, 1 L. D. 565; Dunluce Placer, 6 L. D. 761; Conlin v. Kelly, 12 L. D. 1; Clark v. Ervin, 17 L. D. 550; Maxwell v. Brierly, 10 C. L. O. 50; Rex v. Brettell, 3 B. & Ad. 424; Com'r to J. D. M. Crockwell, 2 C. L. O. 66.

Instructions relative thereto. Com'r to Helena office, Feb. 19, 1891, 18 C. L. O. 15.

Kaolin, how located. Dobbs Placer, 1 L. D. 565.

Potter's clay is not a mineral. Departmental decision of Oct. 7, 1892. Com'r to

Olympia office, Jan. 7, 1892; Com'r to Salt Lake City office, March 12, 1891; Com'r to Helena office, Feb. 19, 1891, 18 C. L. O. 15.

China clay is a mineral. Hext v. Gill, Law Rep. 7 Ch. App. 699.

Diamond: Is a mineral. Atty. Gen. to Secretary, Sept. 8, 1872; Sickel's Min. Dec. 485; Copp's Min. Lands, 88; 17 Opp. Atty. Gen. 115.

Fahlbands: Is a mineral. Circular, July 15, 1873. 1 C. L. O. 11.

Fire-clay (see *Clay*).

Garnet: The General Land Office will express no opinion in advance of the submission of an actual case for decision. Com'r to T. S. Parker, March 22, 1892.

Gas (natural): No decision yet rendered; but in reply to inquiries the office has expressed the opinion that it is not mineral because a substance not of "tangible permanency." Com'r to C. S. Hartman, March 10, 1894.

Gas Shale (see *Bituminous Shale*).

Gilsonite (see *Asphaltum*).

Granite: Discussions as to, and similar substances. No decision yet rendered. Com'r to W. H. Bell, April 12, 1894.

Graphite, Plumbago, Black Lead: Are minerals if the land containing the same comes within the rule laid down in case of W. H. Hooper, 1 L. D. 560. Com'r to C. F. Conrad, Sept. 19, 1893.

Gypsum: Is a mineral. (Placer.) W. H. Hooper, 1 L. D. 560; Conlin v. Kelly, 12 L. D. 1; Maxwell v. Brierly, 10 C. L. O. 50. *Contra*, Com'r to Z. T. Duvall, Dec. 15, 1880, 7 C. L. O. 148.

Guano: Is not a mineral. Com'r to C. H. O'Neill, March 12, 1892.

The discovery of deposits of guano not on lands within the jurisdiction of any other government. See secs. 5570–5577, U. S. Rev. Stat., and act of April 18, 1884 (23 Stat. 11). Rights arising thereunder adjudicated by the State Department. Com'r to C. H. O'Neill, Aug. 31, 1892.

Hot Springs (see *Springs*).

Iron: Is a mineral. Com'r to J. Gaston, Feb. 6, 1892.

Iron may be patented as veins when in rock in place; as placer, when in the form of a deposit. Com'r to A. I. Stewart, 1 C. L. O. 34; 1 Copp's Min. Lands, 124.

Bog iron is not a mineral. Com'r to Del Norte office, Feb. 17, 1890.

Isinglass (see *Mica*).

Kaolin (see *Clay*).

Limestone: Limestone is not excluded from the grant to the Southern Pacific Railroad Company. Com'r to Visalia office, Aug. 15, 1880.

Limestone may be entered under the timber and stone act of June 3, 1878 (20 Stat. 89). Elias Jacob, 7 C. L. O. 83.

Lime and limestone is mineral. Departmental decision of July 15, 1875; Circular, July 15, 1875, 2 C. L. O. 66; W. H. Hooper, 1 L. D. 560; Com'r to Seattle office (Orcas Island Case), August 28, 193; Maxwell v. Brierly, 10 C. L. O. 50; Freezer v. Sweeney, 8 Mont. 508; 21 Pac. Rep. 20. *Contra*, Wheeler v. Smith (Orcas Island Case), 5 Wash. State, 404; 32 Pac. Rep. 784; Rex v. Alberbury, 1 East, 534.

Limestone is a placer deposit. W. H. Hooper, 1 L. D. 560; Conlin v. Kelly, 12 L. D. 1; Shepherd v. Bird, 17 L. D. 82; Com'r to H. C. Rolfe, 2 C. L. O. 66; Copp's Min. Lands, 176; Maxwell v. Brierly, 10 C. L. O. 50.

Land containing deposits of stone suitable for the manufacture of lime may be entered either under the placer laws or under the "timber and stone act" of June 3, 1878 (20 Stat. 89), and, when claimed under both laws, the rights of contesting claimants must be decided by priority of assertion of a legal claim. Shepherd v. Bird, 17 L. D. 82.

Lithographic Stone (see *Stone*).

Marble: Is a mineral. (Placer.) Com'r to J. D. M. Crockwell, 2 C. L. O. 66; Maxwell v. Brierly, 10 C. L. O. 50; Conlin v. Kelly, 12 L. D. 1.

Tecalli Marble: The General Land Office will express no opinion in advance of the submission of an actual case for decision. But see case of Maxwell v. Brierly, 10 C. L. O. 50; Com'r to J. Guthrie Savage, Aug. 12, 1892.

Mica: Is a mineral. (Placer.) Com'r to W. A. Arnold, 2 C. L. O. 131; Copp's Min. Lands, 182; Maxwell v. Brierly, 10 C. L. O. 50; Conlin v. Kelly, 12 L. D. 1.

Excluded from railroad grants as mineral. Com'r to W. A. Arnold, Copp's Min. Lands, 182; 2 C. L. O. 131.

Mineral Wax (see *Ozocerite*).

Natural Gas (see *Gas*).

Nitrate of Potash (see *Potash*).

Nitrate of Soda (see *Soda*).

Onyx: No opinion is expressed as to whether or not lands valuable for their deposit of

onyx are excepted from a railroad grant. Com'r to J. Guthrie Savage, Aug. 12, 1892. See, also, Com'r to W. H. Bell, April 12, 1894.

Opal: Is a mineral if lands are most valuable therefor. Com'r to F. T. Palmer, July 19, 1894.

Ozocerite or Mineral Wax: Definition and discussion. The General Land Office will express no opinion, in advance of the submission of an actual case, as to whether or not it is subject to entry under the mineral laws. Com'r to J. Thomas Turner, May 27, 1892.

Paint Rock: Is a mineral. Hartwell v. Cammon, 2 Stock. Ch. (N. J.) 128.

A "deposit of mineral paint rock *in place*" is not subject to placer entry. (No opinion expressed as to whether or not paint rock is a mineral.) Charles A. Barnes, 7 L. D. 66.

Perodats: No opinion expressed. Com'r to T. S. Parker, March 22, 1892.

Petroleum—Oil: Is a mineral. (Placer.) Com'r to Surveyors General, 1 C. L. O. 179; Com'r to A. A. Dewey, 9 C. L. O. 51; Downey v. Rogers, 2 L. D. 707; Roberts v. Jepson, 4 L. D. 60; Samuel E. Rogers, 4 L. D. 284; Conlin v. Kelly, 12 L. D. 1; Piru Oil Co., 16 L. D. 117; Kier v. Peterson, 41 Pa. 357; Dark v. Johnston, 55 Pa. 164; Com'r to Surveyor-General California, Copp's Min. Lands, 160. *Contra*, Departmental decision of August 27, 1896, *In re* Union Oil Co.*

As the evidence shows that the oil placer mining claim was located in good faith, it is no defense to a trespass to say that mineral does not exist upon the mining claim. Van Horn v. State of Wyoming, 40 Pac. Rep. 964.

Petroleum Wax: No decisions have yet been rendered, and the authorities are silent as to the nature of the substance. Com'r to Bernard Snow, July 22, 1893.

Potter's Clay (see *Clay*).

Phosphatic Guano (see *Guano*).

Phosphates: Are mineral. Com'r to Gainesville office, Dec. 11, 1889; Com'r to Gainesville office, April 15, 1890, 17 C. L. O. 80; Com'r to Gainesville office, May 20, 1890, 17 C. L. O. 74; Com'r to Gainesville office, May 21, 1890, 17 C. L. O. 75; Gary v. Todd, 18 L. D. 58.

Not excepted from railroad grants in Florida. Tucker v. Florida Ry. & Navigation Co., 19 L. D. 414.

Discussion of the act approved October 1, 1890 (26 Stat. 662). Gary v. Todd, 19 L. D. 475.

Not subject to homestead entry. Gary v. Todd, 18 L. D. 58.

The word "phosphates" should be inserted in non-mineral affidavits in agricultural entries in Florida. Instructions of April 25, 1890, 17 C. L. O. 51.

Lands in Florida claimed prior to April 1, 1890, under the homestead or pre-emption laws, and not known to be valuable for phosphate deposits at date of such claim, may be entered under such laws notwithstanding a subsequent discovery of such deposits. (Act approved Oct. 1, 1890, 26 Stat. 663.) Gary v. Todd, 18 L. D. 58.

Phosphate lands in Florida were not excepted from the grant of June 22, 1874 (18 Stat. 194), to the Florida Railway & Navigation Co. Tucker v. Florida Ry. & Navigation Co., 19 L. D. 414.

Plumbago (see *Graphite*).

Potash (Saltpeter—Nitrate of Soda): Is a mineral. Maxwell v. Brierly, 10 C. L. O. 50.

Rock Salt (see *Salines*).

Salines—Salt: Is not a mineral within the purview of the statute. Cole v. Markley, 2 L. D. 847; Salt Bluff Placer, 7 L. D. 549; Southwestern M. Co., 14 L. D. 597; Hall v. Litchfield, Copp's Min. Lands, 321; Morton v. Nebraska, 21 Wall. 660; 12 Mor. Min. Rep. 451. *Contra*, State v. Parker, 61 Tex. 194; Com'r to J. A. Rollins, 1 C. L. O. 19.

Act for the disposal of salines. Jan. 12, 1877 (19 Stat. 221).

Instructions under the act. Circular of April 10, 1877, 4 C. L. O. 21.

Cannot be entered by land warrants. Morton v. Nebraska, 21 Wall. 660; 12 Mor. Min. Rep. 451.

Reserved by general policy. Morton v. Nebraska, 21 Wall. 660; 12 Mor. Min. Rep. 451.

Cannot be entered under the mining laws. Utah Salt Lands, 18 C. L. O. 53.

Can only be sold in those states which have a grant of saline lands. Not for sale in other states nor in the territories. Utah Salt Lands, 18 C. L. O. 53.

In Nevada they are subject to sale as mineral. Eagle Salt Works, 5 C. L. O. 4. *Contra*, Southwestern M. Co., 14 L. D. 597. (NOTE: The Eagle Salt Works entry was subsequently canceled because the lands were not subject to entry under the mineral land laws.)

*See page 464 for full text of the law.

Character of, a question of fact to be determined by investigation. H. C. Horton, 9 C. L. O. 121.

The general act (Jan. 12, 1877, 19 Stat. 221) provides for the sale of saline lands at auction for not less than $1.25 per acre.

Are not subject to sale and entry in Utah. Salt Bluff Placer, 7 L. D. 549.

Are not subject to desert land entry. Jeremy v. Thompson, 20 L. D. 299.

Are not subject to sale in Colorado. Hall v. Litchfield, Copp's Min. Lands, 321.

Rock salt is subject to entry and sale as mineral. J. R. Megarrigle, 9 C. L. O. 113. *Contra*, Southwestern M. Co., 14 L. D. 597.

Salt springs are not enterable under the mineral land laws. Pagosa Springs, 1 L. D. 562; Salt Bluff Placer, 7 L. D. 549.

Lands containing salt are excepted from the grant to the Central Pacific Railroad Company. Eagle Salt Works, 5 C. L. O. 4.

History of legislation concerning salt. Secretary to Governor of Alabama, Oct. 21, 1895, 21 L. D. 320. See, also, 10 L. D. 222.

In Nebraska some salines go to the state. Morton v. Nebraska, 21 Wall. 660; 12 Mor. Min. Rep. 451.

The return of lands as saline is not conclusive of their character, and if disproven they are subject to agricultural entry. Cole v. Markley, 2 L. D. 847.

A patent for saline lands (which, under the general law, were reserved) is void. Morton v. Nebraska, 21 Wall. 660; 12 Mor. Min. Rep. 451.

Slate: Is a mineral. Com'r to Stockton office, Oct. 23, 1874; Copp's Min. Lands, 143; Conlin v. Kelly, 12 L. D. 1.

In California slate should be entered under the act of June 3, 1878 (timber and stone act, 20 Stat. 89). Parks v. Hendsch, 12 L. D. 100.

Soda: Is a mineral. Downey v. Rogers, 2 L. D. 707; Circular of July 15, 1873, 1 C. L. O. 11.

Nitrate and carbonate of soda are mineral. Circular of July 15, 1873, 1 C. L. O. 11. Regulation governing the entry of, 1 L. D. 561.

Springs (Mineral): Are not subject to entry under the mining laws and constitute no bar to an agricultural entry. Pagosa Springs, 1 L. D. 562; Charles Lennig, 5 L. D. 190; Morrill v. Margaret M. Co., 11 L. D. 563; Departmental decision of March 24, 1896, *In re* Smith v. Wallace.

Hot Springs of Arkansas are reserved. (Act of April 20, 1832, 4 Stat. 505.) Hot Springs Cases, 92 U. S. 698.

Stockwerke: Is a mineral. Circular July 15, 1873, 1 C. L. O. 11.

Stone: Is a mineral. Rosse v. Wainman, 14 M. & W. 859; S. C., 2 Exch. 800; S. C., 15 L. J. Exch. 67; Micklethwait v. Winter, 6 Exch. 644; S. C., 5 E. L. & E. 526; S. C., 20 L. J. Exch. 313; Midland R. R. Co. v. Checkley, Law Rep. 4 Eq. 24; Freezer v. Sweeney, 8 Mont. 508; 21 Pac. Rep. 20; Johnston v. Harrington, 5 Wash. State, 73; 31 Pac. Rep. 316. *Contra*, Wheeler v. Smith, 5 Wash. State, 404; 32 Pac. Rep. 784.

Land containing valuable deposits of building stone is enterable under the placer mining laws. H. P. Bennett, Jr., 3 L. D. 116.

Stone valuable only for building purposes is not subject to entry under the provisions of chapter 6, title XXXII, United States Revised Statutes. (But see act approved August 4, 1892, 27 Stat. 348.) Conlin v. Kelley, 12 L. D. 1.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., October 12, 1892.

Registers and Receivers United States Land Offices:

GENTLEMEN — Attached is a copy of the act of congress of August 4, 1892, entitled "An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws."

The first section of said act extends the mineral land laws already existing so as to bring land chiefly valuable for building stone within the provisions of said law to the extent of authorizing a placer entry of such land. The proviso to said first section excludes lands reserved for the benefit of the public schools or donated to any State from entry under the act.

In cases that may arise hereafter in reference to any lands subject to entry under the mining laws, you will be governed by said act in admitting such entries. The proper instructions for your guidance in so doing may be found in official circular of December 10, 1891, entitled "United States Mining Laws and Regulations Thereunder," to which you are referred, and your special attention is called to the law and instructions therein relating to placer claims.

It is not the understanding of this office that the first section of said act of August 4, 1892, withdraws land chiefly valuable for building stone from entry under any existing law applicable thereto.

The second section of said act of August 4, 1892, makes the timber and stone act of June 3, 1878 (20 Stat. 89), applicable to all

the public-land States. You will observe the same in acting upon applications for entries in your respective districts. For instructions you are referred to the General Circular of February 6, 1892, pages 35 to 38 inclusive.

In allowing placer entries for stone chiefly valuable for building purposes, under first section of the act of August 4, 1892, you will make a reference to said act on the entry papers returned.

Very respectfully,

W. M. STONE,
Acting Commissioner.

Approved October 12, 1892:

GEO. CHANDLER,
Acting Secretary.

[PUBLIC — No. 199.]

AN ACT to authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided*, that lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

SEC. 2. That an act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," approved June third, eighteen hundred and seventy-eight, be, and the same is hereby, amended by striking out the words "States of California, Oregon, Nevada, and Washington Territory" where the same occur in the second and third lines of said act, and insert in lieu thereof the words, "public-land States," the purpose of this act being to make said act of June third, eighteen hundred and seventy-eight, applicable to all the public-land States.

SEC. 3. That nothing in this act shall be construed to repeal section twenty-four of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one.

Approved August 4, 1892. (27 Stat. 348.)

Prior to the act of August 4, 1892 (27 Stat. 342), a placer location could not be legally made for land containing only deposits of glass-sand and building stone, and the act of that date could not validate such a location previously made, in the face of an intervening homestead claim. Clark v. Ervin, 16 L. D. 122; Florence D. Delaney, 17 L. D. 120; Thorne v. Kinsey, 18 L. D. 416.

The act of August 4, 1892 (27 Stat. 348), authorizes a placer entry of land chiefly valuable for building stone. Minnekahta Stone Mine, 15 L. D. 256.

Land containing building stone, fire-clay, limestone, marble or gypsum, in paying quantities, is enterable under the placer laws. Hayden v. Jamison, 16 L. D. 537.

A previous location of a stone placer was validated by the act of August 4, 1892, in the absence of adverse rights. Minnekahta Stone Mine, 15 L. D. 256.

Where land is claimed by one person under the act of August 4, 1892, and by another under the act of June 3, 1878, the question to be determined is one of priority. Shepherd v. Bird, 17 L. D. 82.

A location of a placer claim containing a stone deposit will not defeat a prior railroad selection. Com'r to Helena office, Oct. 20, 1892.

The act of August 4, 1892, provides that stone lands reserved for the benefit of public schools, or donated to any State, shall not be subject to entry under said act. Joseph H. Harper, 16 L. D. 110.

The act of August 4, 1892, does not constitute lands chiefly valuable for building stone "mineral lands," in the general sense in which the term "mineral" is used, in reservations of "mineral lands" from grants to States for school purposes. South Dakota v. Vermont Stone Co., 16 L. D. 268.

A mineral entry of land principally valuable for ordinary building stone, allowed under the then existing practice (prior to Departmental decision, In re Conlin v. Kelly, 12 L. D. 1), excepts the land so entered from the operation of a subsequent grant to a state for school purposes, and may be passed to patent. Paris Gibson, 21 L. D. 327.

A placer location of land containing building stone was made in 1889. A pre-emption declaratory statement was filed by a settler the same year. In 1891 deposits of fire-clay were alleged to have been discovered. *Held*, that as the placer location was based upon a discovery of building stone without legal warrant, the subsequent discovery of fire-clay would not defeat the agricultural claim. (NOTE.—The real reason for the decision was probably failure to prove the existence of valuable deposits of fire-clay.) Clark v. Ervin, 17 L. D. 550.

Sandstone of "superior quality for building and ornamental purposes," and as such extensively utilized, is a mineral, independent of the act of August 4, 1892. McGlenn v. Wienbroeer, 15 L. D. 370; Van Doren v. Plested, 16 L. D. 508.

In an *ex parte* case, a stone placer location made prior to August 4, 1892, will be allowed to stand; but if an adverse right be initiated under other laws, prior to that date, mineral claimants' rights must give way to rights claimed under other laws. Report by Commissioner to the Secretary, December 19, 1894, on House Bill No. 7928, to amend the act of August 4, 1892.

"In order to the exercise of the right of entry under section 1 of the act under consideration" (act approved August 4, 1892, 27 Stat. 348), "and preceding the entry, a discovery will be necessary, and no right will attach in favor of the entrymen until he makes an application to enter, describing it by legal subdivisions if on surveyed land." A claimant under the first section of said act is not vested with possessory title by virtue of a location of the ground, such as is conferred by the placer mining laws. Departmental Instructions dated August 29, 1896.

One claiming the right to enter land under the act of June 3, 1878 (Timber and Stone Act, 20 Stat. 89), has the burden of proving the land to be properly subject to entry under said act. Smith v. Buckley, 15 L. D. 321.

For Timber and Stone Act, see *Timber*, p. 448.

One who quarries stone on the public lands of the United States becomes the owner of such stone, and the fact that he has filed a coal declaratory statement upon the land from which the stone is taken does not in any way affect his ownership of the stone. Johnston v. Harrington, 5 Wash. State, 73; 31 Pac. Rep. 316.

Lithographic Stone: Whether or not it is mineral depends on the particular case, and no decision will be made until a case is submitted for decision in the regular manner to the office. Com'r to C. A. Robinson, Dec. 26, 1893. Citing W. H. Hooper, 1 L. D. 560.

Sulphur: Is a mineral. Utah Mining & Mfg. Co. v. Dickert & Myers Sulphur Co., 6 Utah, 183; 21 Pac. Rep. 1002. Regulations governing entry of, 1 L. D. 561.

Sulphur springs are not enterable under the mineral land laws. Pagosa Springs, 1 L. D. 562. Com'r to Fairplay office, August 25, 1869, Copp's Min. Lands, 75.

Tailings (Mineral-bearing): Lands valuable for deposits of, may (apparently) be located as a mining claim. Rogers v. Cooney, 7 Nev. 213.

Tin: Appears as a lode deposit. Grosfield v. Nigger Hill Cons. M. Co., 14 L. D. 685.

Tacalli Marble (see *Marble*).

Turquois: The General Land Office will not express an opinion in advance of the submission of a regular case. Com'r to T. S. Parker, March 22, 1892.

Umber: Is a mineral. Com'r to William Clayton, January 30, 1875, Copp's Min. Lands, 161.

Wax (Mineral): See *Ozocerite*.

4. *Length and Width of Mining Claims.*

(See SURVEY, p. 137.)

5. *Discovery.*

(See CHARACTER OF LAND, p. 346.)

345. "A vein is discovered when there is disclosed a well-defined body of rock in place carrying gold, which body subsequently proves to be continuous." The only line of demarkation between the vein and the country rock may be the commencement of the rock to bear mineral. Regular, well-defined and easily-distinguished walls are not essential to the existence of the vein. It is not necessary that the ore found shall be "pay ore," for what is waste to-day may, with changed surrounding circumstances, prove to be "pay ore" to-morrow. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

346. Evidence as to the extent and richness of the vein as developed subsequent to location is inadmissible for the purpose of showing the location to have been based upon a discovery thereof. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

347. The fact that mineral (petroleum) has been discovered on adjoining tracts is not proof of the mineral character of the land. Roberts v. Jepson, 4 L. D. 60.

348. A vein is discovered when there is disclosed a well-defined body of rock in place carrying gold, which body is afterwards proven to be continuous, without regard to the value of such body as pay ore. Golden Terra M. Co. v. Mahler (Smith), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

349. Discovery of mineral-bearing rock in place is not essential to a valid discovery, which may be made upon croppings. Failure to perfect a location within the time prescribed by law may be excused by illegal occupation of the ground by other persons. Erhardt v. Boaro, 3 McCrary, 19; 2 Colo. Law Rep. 89; 4 Mor. Min. Rep. 484. Case to supreme court on appeal, opinion by Justice Field (113 U. S. 527, reversing lower court, but not on this point).

350. A location may be based on a discovery of the "croppings" of a vein. Davidson v. Bordeaux, 15 Mont. 245; 38 Pac. Rep. 1075.

351. A mineral discovery sufficient to warrant the location of a mining claim may be regarded as proven, where mineral is found, and the evidence shows that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L. D. 455; Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362; Shreve v. Copper Bell M. Co., 11 Mont. 309; 28 Pac. Rep. 315; Davis' Adm'r v. Weibbold, 7 Mont. 107; 139 U. S. 507.

352. Expert testimony is admissible to show that a claim contains such a vein as the miner discovering it would be likely to follow with the reasonable expectation of finding paying ore. Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362.

353. As between mineral claimants, when it is alleged by one that the lode claim of the other was not based on a valid discovery prior to location, it is no part of the defense to show the existence of a valuable deposit of mineral. The value of the mineral deposit is a matter into which the government does not inquire after discovery and location, save in controversies between mineral and agricultural claimants. Tam v. Story, 21 L. D. 440.

354. "It is the finding of the mineral in rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim." Book v. Justice M. Co., 58 Fed. Rep. 106.

355. In determining the value of land claimed to be valuable for coal, the fact that adjoining tracts are known to contain valuable deposits of coal may be considered in connection with the fact that coal has been discovered upon the land in question. Departmental decision of May 23, 1896, Seifred v. Minelli.

356. Before land may be patented under the mineral land laws, "there must be a discovery of the mineral, and a sufficient exploration of the ground to show this fact beyond question." United States v. Iron Silver M. Co., 128 U. S. 673. See 24 Fed. Rep. 568.

357. The law does not impose any conditions as to the value or extent of the ore. It simply provides that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located. Book v. Justice M. Co., 58 Fed. Rep. 106.

358. Mere discovery of fragments of mineral-bearing ore, not in lode formation, will not form the basis of a valid location of a lode claim. Waterloo M. Co. v. Doe, 56 Fed. Rep. 685.

359. "Under the requirements of the law, a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following it, with the expectation of finding ore; and a valid location of a mining claim may be made of a ledge deep in the ground, and appearing at the surface not in the shape of ore, but in vein matter only." Burke v. McDonald, 2 Idaho, 1022; 29 Pac. Rep. 98.

360. A discovery having been made, the probable value of the land for mineral may be shown by testimony as to the value of neighboring tracts. Hamilton v. Anderson, 19 L. D. 168.

361. "A valid location of a mining claim may be made whenever the prospector has discovered such indication of mineral that he is *willing* to spend his time and money in following, with the expectation of finding ore." He need not be "justified." Burke v. McDonald, 2 Idaho, 1022; 29 Pac. Rep. 98.

362. But something must be found in place, as rock, clay or earth, so colored, stained, changed and decomposed by the mineral elements as to mark and distinguish it from the inclosing country. Burke v. McDonald, 2 Idaho, 646; 33 Pac. Rep. 49.

363. The discovery of one mineral and a valid location carries with it all other min-

erals. Freezer v. Sweeney, 8 Mont. 508; 21 Pac. Rep. 20.

364. Prior to the discovery of minerals prospectors have equal rights. Hibschle v. Gildersleeve, 8 C. L. O. 65 (Colorado court).

365. The discovery assumed to be upon the center of the vein in the absence of exploration and development showing a different condition. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; Helvetia Lode, Sickel's Min. Dec. 40; Hope M. Co., Sickel's Min. Dec. 122; G. B. R. Lode, Sickel's Min. Dec. 119.

366. Under section 2320, United States Revised Statutes, it is the finding of mineral in rock in place that constitutes the discovery, and it is not necessary that the vein or lode should contain mineral of such nature that a practical miner, if he encountered it, would feel justified in following it up, with the reasonable expectation of finding paying mineral. McShane v. Kenkle, 44 Pac. Rep. 979 (Montana).

367. "The law will not distinguish between different kinds and classes of ores, if they have appreciable value in the metal for which the location was made. Nor is it necessary that the ores shall be of economical value for treatment. It is enough that it is something beyond a mere trace which can be positively and certainly verified as existing in the ore." Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557. Quoted in Shreeve v. Copper Bell M. Co., 11 Mont. 309; 28 Pac. Rep. 315. Cases cited: Erhardt v. Boaro, 113 U. S. 527; 4 Mor. Min. Rep. 432; Iron Silver M. Co. v. Cheesman, 116 U. S. 529; Eureka Case, 4 Sawy. 302; 9 Mor. Min. Rep. 578; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362. (See 111 U. S. 350.) Territory v. Mackey, 8 Mont. 168; 19 Pac. Rep. 395; Merrill v. Dixon, 15 Nev. 401.

368. On adverse suit, either party may show the invalidity of the other's location from any cause, even by showing the discovery workings to be situate on ground covered by a valid prior location of a third party. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.) Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

369. "A location since the 10th day of May, 1872, based on a discovery made within the limits of a claim properly located, and not abandoned or lost by failure to perform the labor thereon required by law, is an invalid location; for by the provisions of section 2322, the locator of such claim has the exclusive right of possession and enjoyment of all the surface included within the lines of the location, 'and of all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines.' If the locator then has the exclusive right of the possession and enjoyment, how can a prospector go on such claim and make a valid discovery?" Branagan v. Dulaney, 2 L. D. 744.

370. A valid location cannot be based upon a discovery made within the limits of a prior subsisting location. It must be made upon the unoccupied and unappropriated public domain, and the mere fact that the prior locator does not object is immaterial unless he abandons the ground in conflict. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

371. Where the original discovery shaft of a mining location is included within a subsequent location as patented, on the failure of the first locator to commence adverse proceedings within the time required, or to set up a new discovery stake at a new discovery shaft on unappropriated ground, he loses all rights under the prior location, not only as against the patentee but also as against subsequent locators. Girard v. Carson, 44 Pac. Rep. 508 (Colorado).

372. A discovery made in a shaft on the line of a claim and partly within the limits of a prior location is valid. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

373. The fact that a location is based upon a discovery within a prior location does not, *proprio vigore*, invalidate the second location; as, if application is made therefor and no adverse claim is filed, it is conclusively presumed that the first locator had no right to the ground common to the two locations. Branagan v. Dulaney, 2 L. D. 744.

374. The sinking of a discovery shaft on a vein already located, within such location, confers no rights, as only one discovery of mineral may be made upon a lode claim for

the purpose of basing a location. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

375. The validity of a location based upon a discovery made within a prior location, with the consent of the prior locator, may not be questioned on that account by a grantee of such prior locator, as the assent of his grantor to the making of the second discovery and location operated as an abandonment of his conflicting rights. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

376. A relocator of an abandoned claim may base the relocation on a discovery of mineral already made by the original locator, and may adopt the original markings of the claim. (But in Colorado he must perform ten feet of development work.) Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

377. A location based upon a discovery made upon a prior location may be validated by a relinquishment of the ground including such discovery, by the senior locator, before the intervention of an adverse right. McEvoy v. Hyman, 25 Fed. Rep. 596; 15 Mor. Min. Rep. 397.

378. A mineral entry of two locations based on one discovery of mineral in a discovery shaft on the line between two locations will be canceled. Poplar Creek Cons. Quartz Mine, 16 L. D. 1.

379. A location based on a discovery made within the limits of a prior subsisting location is invalid. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Branagan v. Dulaney, 2 L. D. 744.

380. Where it appears that the ground on which are situate the discovery and improvements of an entered claim has been patented as part of another claim, the entryman may furnish proof of discovery of a lode outside of the patented conflict and that the requisite expenditure has been made on claimed ground. Gustavus Hagland (on review), 1 L. D. 593; Spur Lode, 4 L. D. 160.

381. The exclusion from application for patent of that portion of the claim containing the discovery renders it incumbent on the applicant to show a discovery of mineral upon the claimed ground. Cayuga Lode, 5 L. D. 708; Silver Jennie Lode, 7 L. D. 6.

382. A location of a lode claim must be based on a discovery of a vein or lode on vacant public land. If the discoverer, whose sole discovery is upon a conflicting claim, allows such conflicting claim to be patented inclusive of his discovery, he loses all right under his location, and his claim becomes open to exploration and location by others. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

383. Where the discovery is on excluded ground, and none other is shown, the entry will be canceled, though entryman may own such excluded ground. Lone Dane Lode, 10 L. D. 53.

384. Evidence that the discovery shaft is not upon claimed ground is admissible as going to show the invalidity of the claim. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

385. A discovery on excluded ground is not sufficient to support a location. There must be shown a discovery on claimed ground. Spur Lode, 4 L. D. 160; Cayuga Lode, 5 L. D. 708; Silver Jennie Lode, 7 L. D. 6; Antediluvian Lode & Mill Site, 8 L. D. 602; Independence Lode, 9 L. D. 571; Lone Dane Lode, 10 L. D. 53.

386. A discovery made on ground covered by a location excluded from application for patent therefor is a good basis for a subsequent location. Adams Lode, 16 L. D. 233.

387. A second discovery within the limits of a legal location does not affect the rights of the first locator. Hibschle v. Gildersleeve (U. S. Dist. Court, Colo. 1880), 8 C. L. O. 65.

(1) Tunnel.

(See TUNNEL, p. 66.)

388. A tunnel claimant has no cause for adversing the application of a lode claimant who has made a discovery outside of the line of the tunnel, and whose location lies across the line of the tunnel, unless the lode has been discovered in the tunnel. Hope M. Co. v. Brown, 7 Mont. 550; 19 Pac. Rep. 218. (Overruled, S. C., 11 Mont. 370; 28 Pac. Rep. 732, wherein it is held that patent proceedings by the lode claimant will be suspended until development of the lode in the tunnel or the abandonment of the tunnel right, and (*semble*)

the lode claimant may be restrained from taking ore from the line of the tunnel in the meantime. Refusing to follow Corning T. & M. Co. v. Pell, 4 Colo. 507; 14 Mor. Min. Rep. 612.)

389. Before a tunnel claimant, under section 2323, United States Revised Statutes, acquires any right to a lode it must be discovered in the tunnel. Corning T. & M. Co. v. Pell, 4 Colo. 507; 14 Mor. Min. Rep. 612.

390. On discovery of lode in the tunnel, within three thousand feet of the face thereof, the tunnel claimant may locate one thousand five hundred feet of such lode, subject only to the requirement that his discovery must be covered by his claim. Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. Rep. 200.

391. A location on the surface, based on a tunnel discovery, will relate back to the location of the tunnel claim, and cut out an intervening surface location of the same lode. Rico-Aspen M. Co. v. Enterprise M. Co., 58 Fed. Rep. 321.

392. A discovery of a lode in a tunnel gives the right to make a surface location thereof, just as a discovery on the surface would do. Rico-Aspen M. Co. v. Enterprise M. Co., 58 Fed. Rep. 321.

393. A discovery made in a tunnel held in accordance with the provisions of section 2323, United States Revised Statutes, gives the same right to the discoverer as a discovery on the surface, viz., the right to locate a surface claim of one thousand five hundred by six hundred feet. Hope M. Co. v. Brown, 7 Mont. 550; 19 Pac. Rep. 218; Ellet v. Campbell, 18 Colo. 510; 33 Pac. Rep. 521.

394. A location based on a discovery in a tunnel not on the claim is invalid. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirming 6 Colo. 581; 15 Mor. Min. Rep. 458.)

395. A lode discovered in a tunnel in accordance with the provisions of section 2323, United States Revised Statutes, and of which a location notice was posted at the mouth of the tunnel, and duly recorded, need not be located by the discoverer on the surface to protect his right, and a subsequent locator on the surface acquires no rights. Ellet v. Campbell, 18 Colo. 510; 33 Pac. Rep. 521.

396. When in running a tunnel a lode is struck, the same proceedings are required as in cases of a discovery on the surface, in the matter of location. David Hunter, 5 C. L. O. 130.

397. Discoverers of veins from the surface on the line of a prior tunnel will be restrained until it appears that the veins will not be discovered in the tunnel, or until such tunnel rights have been abandoned. Hope M. Co. v. Brown, 11 Mont. 370; 28 Pac. Rep. 732. (Hope M. Co. v. Brown, 7 Mont. 550; 19 Pac. Rep. 218, reviewed and overruled.)

(2) Record.

398. Failure on the part of a senior discoverer to record his location notice within the time prescribed by law will not validate an overlapping location based on a junior discovery, in the absence of a relocation of the conflict by the junior discoverer. Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

399. The record of a location certificate is presumptive evidence that a discovery was made as alleged therein. Cheesman v. Shreeve, 40 Fed. Rep. 787.

(3) Agricultural Lands.

(See AGRICULTURAL CLAIM, p. 376.)

400. An agricultural claimant may take tracts rendered non-contiguous by the exclusion of land discovered to be mineral subsequent to his original entry. Lannon v. Pinkston, 9 L. D. 143.

401. A discovery of mineral subsequent to the date of a hearing as to the character of the land may be set up as a basis for a second hearing. Werle v. Murphy, 15 C. L. O. 183.

402. Where an agricultural entry is contested for alleged mineral character of the land entered, an actual discovery of valuable mineral must be shown. Carron v. Curtis, 5 C. L. O. 3.

403. A discovery on an adjoining tract is of no effect to establish the mineral character of the land involved. Departmental decision of March 17, 1891, In re Udall v. Jepson; Departmental decision of July 13, 1891, In re Bryan v. Central Pacific R. R. Co.; Commissioners of King County v. Alexander, 5 L. D. 126.

404. A discovery of mineral after title has passed will not divest the same. State of Col-

orado, 7 L. D. 459; Abraham L. Miner, 9 L. D. 408.

405. A discovery of mineral after submission of final proof in support of an agricultural entry confers no right on the discoverer. Colorado Coal & Iron Co. v. United States, 123 U. S. 307; Harnish v. Wallace, 13 L. D. 108; Dickinson v. Capen (on review), 14 L. D. 426; John F. De Laney, 18 C. L. O. 65.

406. Under a grant of school lands, "the State's title vests, if at all, at the date of the completion of the survey (Cooper v. Roberts, 18 How. 173; Virginia Lode, 7 L. D. 459), and if the land, although in reality mineral, was not then *known* to be mineral, the subsequent discovery of its mineral character would not divest the title which had already passed." Abraham L. Miner v. State of California, 9 L. D. 409; State of California v. Poley, 4 C. L. O. 18; J. Dartt, 5 C. L. O. 178; Town of Silver Cliff v. State of Colorado, 6 C. L. O. 152; State of Colorado, 6 L. D. 412; 7 L. D. 490; Virginia Lode, 7 L. D. 459; Warren v. State of Colorado, 14 L. D. 681; Pereira v. Jacks, 15 L. D. 273; Frees v. State of Colorado, 22 L. D. 510; Com'r to J. A. Coffer, Oct. 3, 1891.

407. A State admitted before the survey of lands is entitled to sections 16 and 36 under its school grant if they are not known to be mineral at date of the approval of the survey, and a discovery of mineral thereon, subsequently, will not defeat the right of the State. The State acquires no rights, however, by an irregular survey which is approved and thereafter suspended. Virginia Lode, 7 L. D. 459.

408. If lands claimed by a State under the grant excepting mineral lands are discovered to be mineral before certification to the State, they do not pass under the grant. State of Colorado, 7 L. D. 490 (contrary to other Departmental decisions, and expressly overruled in case of Abraham L. Miner v. State of California, 9 L. D. 408).

409. Although the grant to a railroad company is one *in præsenti* and the land may have been returned as non-mineral by the surveyor-general prior to the grant, the fact as to whether or not the same is mineral, and is or is not excepted from the grant because of its mineral character, may be determined by the Land Department at any time prior to the issuance of patent to the railroad company; and the discovery of the mineral character of the land at any time prior to the issuance of the patent therefor, under a grant excepting mineral lands, will exempt the land from the operation of the grant. Barden v. N. P. R. R. Co., 154 U. S. 288 (strong dissenting opinion); C. P. R. R. Co. v. Valentine, 11 L. D. 238; North Star M. Co. v. C. P. R. R. Co., 12 L. D. 608; S. P. R. R. Co. v. Allen G. M. Co., 13 L. D. 165; N. P. R. R. Co. v. Champion Cons. M. Co., 14 L. D. 699; O'Conner v. N. P. R. R. Co., 15 L. D. 247; Winscott v. N. P. R. R. Co., 17 L. D. 274; N. P. R. R. Co. v. Marshall, 17 L. D. 545. See, also, Samuel W. Spong, 5 L. D. 193.

410. The right of a railroad company, under its grant, is not defeated by the discovery of mineral subsequent thereto. Frencoeur v. Newhouse, 40 Fed. Rep. 618. *Contra*, Barden v. N. P. R. R. Co., 154 U. S. 288 (strong dissenting opinion); C. P. R. R. Co. v. Valentine, 11 L. D. 238.

411. Where mineral has been discovered on land after the tract has been embraced in a homestead entry, a mineral claimant will be limited to twenty-five feet of surface ground on each side of the middle of the vein. Ryan v. Buivert, 14 C. L. O. 283.

412. The character of land (whether mineral or non-mineral) embraced in a homestead claim may be questioned up to the date of final entry. A discovery of its mineral character between the submission of defective proof and date of final entry will defeat the homestead claim. Spratt v. Edwards, 15 L. D. 290.

413. A discovery of the mineral character of land embraced in an original homestead entry will defeat the entry. Dickinson v. Capen, 14 L. D. 426.

414. The known character of the land at the date of final homestead entry determines whether or not it should be excluded from the homestead claim because of its mineral character, the discovery of mineral subsequent to such final entry being immaterial. Rea v. Stephenson, 15 L. D. 37.

415. The discovery that land is valuable for coal, after final homestead entry, will not reserve it from patenting under the homestead entry. Nicholas Abercrombie, 6 L. D. 398.

416. The discovery of the mineral character of the land covered by a homestead claim at any time prior to final homestead entry will defeat the same. Jones v. Driver, 14 L. D. 514.

417. Lands in Florida claimed prior to April 1, 1890, under the homestead or pre-emption laws, and not known to be valuable for phosphate deposits at date of such claim, may be entered under such laws, notwithstanding a subsequent discovery of such deposits. (Act of Oct. 1, 1890, 26 Stat. 663.) Gary v. Todd, 18 L. D. 58.

418. "Thus read they must be held, we think, merely to prohibit the passage of title, under the provisions of the town-site laws, to mines of gold, silver, cinnabar or copper, which are known to exist, on the issue of the town-site patent, and to mining claims and mining possessions, in respect to which such proceedings have been taken under the law or the customs of miners as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The exceptions of mineral lands from pre-emption and settlement and from grants to States for universities and schools, for the construction of public buildings and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining States which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral' in the sense of this statute is applicable." Davis' Adm'r v. Weibbold, 139 U. S. 507. (Citing and approving Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348; Cowell v. Lammers, 10 Sawy. 246; 21 Fed. Rep. 200; 3 West Coast Rep. 504; United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486; Merrill v. Dixon, 15 Nev. 401; Alford v. Barnum, 45 Cal. 482; 10 Mor. Min. Rep. 422; Dughi v. Harkins, 2 L. D. 721; Cleghorn v. Bird, 4 L. D. 478; Samuel W. Spong, 5 L. D. 193; Commissioners of Kings County v. Alexander, 5 L. D. 126; Magalia G. M. Co. v. Ferguson, 6 L. D. 218; Nicholas Abercrombie, 6 L. D. 393; John Downs, 7 L. D. 71; Cutting v. Reininghaus, 7 L. D. 265; Creswell M. Co. v. Johnson, 8 L. D. 440; Thomas J. Laney, 9 L. D. 83).

419. Land covered by a town-site patent may not be entered under the mineral land laws because discovered, after the town-site entry, to be valuable for mineral. Thomas J. Laney, 9 L. D. 83.

420. A town-site entry and patent are "inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation or improvement for residence or business under the town-site title." Deffeback v. Hawke, 115 U. S. 392.

421. Where a mining claim is located upon an Indian reservation and the locator is in possession at the date the reservation is thrown open, "with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, he could, by adopting what had been done, causing a proper record to be made, and performing the amount of labor or making the improvement necessary to hold the claim, date his rights from that day; and that such location and labor and improvements would give him the right of possession." Noonan v. Caledonia M. Co., 121 U. S. 393. (Affirming 3 Dak. 189; 14 N. W. Rep. 426.)

422. The discovery of a mine within the limits of a private land grant did not destroy the title under the grant. Fremont v. United States, 17 How. 442.

423. The rights of an agricultural claimant will not be affected by the discovery of mineral after final agricultural entry. Arthur v. Earle, 21 L. D. 92.

424. To be reserved from entry under the agricultural land laws and from a patent issued under said laws, land must have been known at the time of sale (entry) to be valuable for its minerals. A discovery of its mineral character subsequent to that date cannot affect the title. Deffeback v. Hawke, 115 U. S. 392.

425. If a lode is not known at date of agricultural entry, but is subsequently discovered and located, the claimant may not follow it on its dip under the agricultural claim. Amador-Medean G. M. Co. v. South Spring Hill G. M. Co., 13 Sawy. 523; 36 Fed. Rep. 668.

426. "To constitute the exemption contemplated by the pre-emption act under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under

the conditions existing at the time, than for merely agricultural purposes. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale." Colorado Coal & Iron Co. v. United States, 123 U. S. 307.

427. To be excepted from a pre-emption entry as mineral, land must be known to be such at date of the agricultural entry. A discovery of mineral after pre-emption entry of the land would not defeat the pre-emption entry. Harnish v. Wallace, 13 L. D. 108.

428. Open and notorious possession for mining is sufficient to charge an applicant for agriculture patent with notice of the mineral character of the land, and to bring such land within the description of known mineral deposits. Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

429. The value of mineral discovered in a mining claim will not be inquired into by the Land Department, except in a controversy between mineral and agricultural claimants as to the character of the land. Tam v. Story, 21 L. D. 440.

430. The presumption arising upon the location of a mining claim, that the land covered thereby is mineral in character, though returned as agricultural, exists only where such location is legally made and based upon a proper discovery. Rhodes v. Treas, 21 L. D. 502.

(4) Title.

(See TITLE, p. 201.)

431. Discovery and appropriation are recognized as the source of title to mining claims, and development by working, as the condition of continued ownership, until issuance of patent therefor. (Entry of the claim and payment for the land.) Erhardt v. Boaro, 2 McCrary, 141; 1 Mor. Min. Rep. 452; 113 U. S. 527; O'Reilly v. Campbell, 116 U. S. 418. (Citing Jennison v. Kirk, 98 U. S. 453; Jackson v. Roby, 109 U. S. 440.)

432. Discovery and appropriation is the source of title of a mining claim under the act of 1866, as well as that of 1872. Jackson v. Roby, 109 U. S. 440.

433. Local rules and customs of miners recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. Jennison v. Kirk, 98 U. S. 453. (Affirming Titcomb v. Kirk, 51 Cal. 288; 5 Mor. Min. Rep. 10.)

434. The discovery and location of a claim in pursuance of the law is equivalent to a contract of sale and purchase where the purchaser is let into possession and becomes entitled to a deed upon payment of the purchase-money and making a certain expenditure. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

435. A partnership is not constituted by the agreement of A. to pay B. wages and give him an interest for the discovery of a paying mine. Berry v. Woodburn, 107 Cal. 504; 40 Pac. Rep. 802.

436. If the title to the land on which the discovery is situated fails, the whole location is lost. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

437. New discoveries after the sale, by which the land becomes profitable to work as a mine, cannot affect the title as it passed at the time of the sale. Colorado Coal & Iron Co. v. United States, 123 U. S. 307.

(5) Placer.

(See PLACER, p. 321.)

438. The discovery, subsequent to application for a placer patent, of veins or lodes within the limits of the placer claim, does not affect the rights of the placer applicant. United States v. Iron Silver M. Co., 128 U. S. 673.

439. A placer patent conveys to the patentee full title to all lodes or veins within the territorial limits not then known to exist; nothing disclosed after the issue of patent can limit the effect of a patent, or except from its scope any vein or lode within its territorial limits. Sullivan v. Iron S. M. Co., 143 U. S. 431.

440. Where a lode claim conflicts with a placer, the lode discovery being outside of the conflict, there is no presumption of a continuation of the lode into the placer ground. (Raunheim, placer claimant, filed application, and gave notice. Dahl, lode claimant, did not adverse. *Hence*, Dahl is estopped

from questioning the validity of the placer claim.) Raunheim v. Dahl, 6 Mont. 167; 9 Pac. Rep. 892; S. C., 132 U. S. 260.

441. A lode claim intersected by an excluded placer must be restricted upon entry to that one of its non-contiguous parts on which is situate the discovery. Silver Queen Lode, 16 L. D. 186.

442. There must be a discovery on every twenty acres, or fraction thereof, of a placer claim. Com'r to Los Angeles Office, March 1 and July 29, 1890; Ferrell v. Hoge, 18 L. D. 81. (Affirmed on review, 19 L. D. 568.) *Contra:* Not required, the claim being an entirety. McDonald v. Montana Wood Co., 35 Pac. Rep. 668.

443. Under Ferrell v. Hoge, 18 L. D. 81, a claimant will be allowed an opportunity to make a showing of discovery on every twenty acres of a placer claim. Ferrell v. Hoge (on review), 19 L. D. 568.

444. A location of a placer claim must be based on a discovery of a valuable mineral deposit. Reins v. Murray, 22 L. D. 409. *Contra*, Gregory v. Pershbaker, 78 Cal. 109; 14 Pac. Rep. 401; 15 Mor. Min. Rep. 602.

(6) Patent.

(See PATENT, p. 261.)

445. A patent cannot be issued based upon a discovery made after application thereof. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

446. Patent will not issue for a lode mining claim where the land on which is situate the discovery and improvements is excluded from the entry, unless a discovery and the required expenditure are shown to have been made on entered ground. Antediluvian Lode & Mill Site, 8 L. D. 602; Thomas J. Laney, 9 L. D. 83; E. W. Williams, 20 L. D. 458.

447. A mining patent is conclusive proof of discovery and location according to law. Such patent takes effect by relation as of date of location. Talbott v. King, 6 Mont. 131.

448. The issuance of patent evidences discovery, proper location, marking, posting of notice, recording thereof, requisite expenditure, notice of application, and that all other steps to acquire patent, required by law, were regularly taken. N. P. R. R. Co. v. Cannon, 7 U. S. App. 507; Last Chance M. Co. v. Tyler M. Co., 15 U. S. App. 456.

449. When the complaint in an action to annul a patent alleged in substance that no discovery had been made, and the evidence is conflicting, proof that the claim was considered valuable for mining purposes was held to be sufficient proof of its mineral character, and the patentees were not obliged to show that there was a reasonable probability of the claim becoming a source of profit to constitute it a mine within the meaning of the statute. United States v. King, 9 Mont. 75; 22 Pac. Rep. 498.

450. The patenting of the discovery shaft of the first locator, to a subsequent locator of a conflicting claim, leaves the first claim subject to relocation. Miller v. Girard, 33 Pac. Rep. 69.

451. The decision of the Department, In re Juniata Lode, 13 L. D. 715 (wherein the Department consented to accept a reconveyance of the part of a patented placer claim covered by a lode location, for the purpose of issuing patent for the lode claim without suit to vacate the placer patent), is not applicable where it is desired to allow a lode patentee to reconvey a tract for the purpose of giving an unpatented lode claim its discovery. Winter Lode, 23 L. D. 362.

(7) Expenditure.

(See EXPENDITURE, p. 224.)

452. Miners' rules required possession of a mining claim to be predicated on a discovery and maintained by development work. Con. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490. (Following Jennison v. Kirk, 98 U. S. 453.)

453. Where the discovery and improvements are excluded from the entry of a mining claim, the entry will be canceled, unless it is shown that mineral has been discovered and the requisite expenditure made upon claimed ground. A reconveyance by another lode claimant of the patented excluded ground will not be accepted, in such a case, as re-investing title to the same in the government for the purpose of patenting it with the claim last entered. Winter Lode, 22 L. D. 362.

454. The first discoverer of a mine can derive no benefit from his discovery unless he

follows it up by work for the development of his claim. Jackson v. Roby, 109 U. S. 440.

455. The discovery and development work must be on claimed ground. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed in 6 Colo. 581; 15 Mor. Min. Rep. 458.)

456. A hearing should be ordered upon the protest of one alleging non-compliance by an entryman with the law relating to discovery, expenditure and notice of application for patent. Weinstein v. Granite Mtn. M. Co., 14 L. D. 68.

457. Discovery and expenditures must be shown within the limits of a new (amended) survey. Thomas J. Laney, 9 L. D. 83.

458. Where that portion of the claim entered on which are situate the discovery and improvements is excluded from the entry, it is incumbent on the claimant to show a discovery and the required expenditure on claimed ground. (Following Antediluvian Lode and Mill Site, 8 L. D. 602.) Independence Lode, 9 L. D. 571; Lone Dane Lode, 10 L. D. 58.

(8) Dip and Apex.

(See VEINS, p. 11.)

459. A vein need not necessarily crop out on the surface in order that a location may be properly laid upon it; but where the vein does crop out along the surface or is slightly covered by foreign matter, so that the course of the apex can be readily ascertained, this course should be substantially followed in laying claims and locations upon it. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

460. A location based on a discovery on the dip of a lode is void. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

461. If the apex of a vein has been duly located, one who sinks a discovery shaft on the dip can acquire no rights as against the locator of the apex. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

462. The top or apex of a vein must be found within the limits of a claim located to form the basis of a valid location; but such apex is not necessarily a point, but may be a line of great length; and if a portion of it is discovered within the claim, that is sufficient upon which to place a valid location. Larkin v. Upton, 144 U. S. 19. (Affirming 5 Mont. 449; 6 Pac. Rep. 66; 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404.)

463. The burden of proving his right is upon a miner who follows a lode on its dip within a claim of another. Cheesman v. Shreeve, 40 Fed. Rep. 787.

464. The unauthorized underground working of a lode will not prevent its location by the discoverer of the apex, as "the possession of a vein recognized by the mining laws and to which protection is given is by one who holds the surface where the vein makes its apex." Eilers v. Boatman, 3 Utah, 159; 1 West Coast Rep. 632; 2 Pac. Rep. 66; 15 Mor. Min. Rep. 462. On appeal, 111 U. S. 356; 15 Mor. Min. Rep. 462.

(9) Shaft.

465. A discovery, although not in the discovery shaft, is sufficient as a basis for a location. Evidence showing such discovery is properly admitted. O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302.

466. A location notice need not show the position of the discovery shaft. Quimby v. Boyd, 8 Colo. 194; 6 Pac. Rep. 462.

467. A discovery elsewhere than in the discovery shaft after location will not avail to hold the claim, as the location rests on what may be found in the discovery shaft. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

468. The first shaft sunk upon a claim is not necessarily the discovery shaft. Terrible M. Co. v. Argentine M. Co., 5 McCrary, 639.

469. In ejectment for a mining claim, where it appears that the discovery shafts of both parties are identical, evidence that the discoveries were made on lands patented prior to the dates of discovery of either party should be admitted, and if the fact is found neither party can recover. Moyle v. Bullene, 44 Pac. Rep. 69 (Colorado).

470. "It is the discovery of mineral that entitles the discoverer to a claim; it is equally meritorious whether discovered in the discovery shaft or in any other part of the surface ground of his claim, as the National statute is silent as to where it shall be found." Wight v. Tabor, 2 L. D. 738; 2 L. D. 749; Har-

rington v. Chambers, 3 Utah, 94; 1 Pac. Rep, 362. See 111 U. S. 350.

471. In ejectment the plaintiff must prove a legal location based on a discovery of mineral-bearing rock in place in a discovery shaft such as is required by State statute. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

472. The Colorado statutes require a ten-foot discovery shaft, or an adit of that length. *Held*, that the whole length of an adit, both covered and uncovered, may be considered. Electro Magnetic M. & Dev't Co. v. Van Auken, 11 Pac. Rep. 80.

473. A relocator of an abandoned claim, under the Colorado statutes, must either sink the discovery shaft ten feet deeper or make a new opening of the required depth or length. Little Gunnell M. Co. v. Kimber, 1 Mor. Min. Rep. 536.

474. The Colorado statute requiring a ten-foot discovery shaft, impliedly upheld by the supreme court. Erhardt v. Boaro, 113 U. S. 527; 4 Mor. Min. Rep. 432.

475. A relinquishment, after entry, of a discovery shaft of a conflicting claim, for the purpose of validating an otherwise invalid location, will not be allowed. Independence Lode, 9 L. D. 571.

476. The patenting of the discovery shaft of first locator to a subsequent locator of a conflicting claim leaves the first claim subject to relocation. Miller v. Girard, 33 Pac. Rep. 69.

477. In an adverse suit to determine the right of possession of mining property, a finding by the jury that the plaintiff did not discover a vein or lode on the disputed premises will be set aside as contrary to the evidence where there was uncontradicted testimony by plaintiffs that they had sunk a shaft and had on a certain day discovered a vein or lode, and the indications were sufficient to warrant further work in exploiting it. Walsh v. Mueller, 16 Mont. 180.

(10) Abandonment.

(See ABANDONMENT, p. 128.)

478. A relocator cannot avail himself of mineral in the public lands which another has discovered, until the discoverer has, in law, abandoned his claim, and left the property open for another to take up. Belk v. Meagher, 104 U. S. 297; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65.

479. The sale of that portion of the claim containing the discovery is not *per se* an abandonment of the remainder of the claim. Little Pittsburgh Cons. M. Co. v. Annie M. Co., 5 McCrary, 296.

(11) Posting.

(See POSTING, p. 172.)

480. "A mere posting of notice on a ridge of rocks cropping out of the earth, or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not itself initiate any right. There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence. Erhardt v. Boaro, 113 U. S. 527.

481. A location notice need not be posted at the precise point of discovery, but should be near it. Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

482. The Montana statute requiring the location notice to be posted at the discovery point is satisfied if the notice is posted at a shaft in which there is no mineral, provided mineral has been disclosed elsewhere on the claim. O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302.

483. Mere posting of a location notice, without a discovery, confers no right. Eilers v. Boatman, 111 U. S. 356; 15 Mor. Min. Rep. 471; S. C., 3 Utah, 159; 2 Pac. Rep. 66; 15 Mor. Min. Rep. 462; 1 West Coast Rep. 632.

484. A. makes a discovery and posts notice. B. then does the same. Within the time allowed each makes a location, defective in that sufficient description of the claim is not given in the certificate. B. makes and files a correct amended notice, and A. subsequently does the same. *Held*, that A. has the better right. Craig v. Thompson, 10 Colo. 517; 16 Pac. Rep. 24.

485. The location notice must be posted at the discovery point under the Colorado

statute. McCaig v. Bryan, 10 Colo. 309; 15 Pac. Rep. 413.

486. After a lapse of several years it may be presumed in favor of one holding by purchase that the discovery notice was properly posted. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329; Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178.

487. The erection of a discovery-stake and notice is sufficient to protect the discoverer's rights during the time allowed by Colorado statutes for completing a location. Erhardt v. Boaro, 2 McCrary, 141. See 113 U. S. 527; 4 Mor. Min. Rep. 432.

488. "If, after one has discovered a lode and set up a notice of his claim to it, and within the time fixed by the law for doing the work necessary to a valid location, another, coming to the same place and taking possession thereof to the exclusion of the first, shall not have advantage of his own wrong; nor shall the subsequent locator be permitted to allege anything against the right of the first locator. Erhardt v. Boaro, 3 McCrary, 19; 2 Colo. Law Rep. 89; 4 Mor. Min. Rep. 434. See 113 U. S. 527; 4 Mor. Min. Rep. 432.

(12) Time.

489. A. locates, then B. locates. If B. gets mineral first he has the superior right. But A. may keep B. off as a trespasser before B.'s discovery. Crossman v. Pendery, 2 McCrary, 139; 8 Fed. Rep. 693; 1 Colo. Law Rep. 496; 4 Mor. Min. Rep. 431.

490. In the absence of a statute governing the subject, the discoverer of a lode has a reasonable time within which to perfect his location on the ground. *Held*, ninety days is not a reasonable time, but an unreasonably long time. Murley v. Ennis, 2 Colo. 300; 12 Mor. Min. Rep. 360; Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542; Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

491. The discoverer of a vein has a reasonable time after posting his discovery notice within which to perfect his location: but he may not post notices on numerous claims for the purpose of keeping off other prospectors and then go back and perfect his locations at his leisure. Burke v. McDonald, 2 Idaho, 646; 33 Pac. Rep. 49.

492. If a location is perfected within a reasonable time from posting of discovery notice (in this case two days), it will relate back to the date of posting such notice and cut out intervening locations. Burke v. McDonald. 2 Idaho, 1022; 29 Pac. Rep. 98.

493. In the absence of local statutes or regulations, a discoverer has no time for marking his claim after discovery, but must proceed with diligence to perfect his location. Patterson v. Tarbell, 26 Oreg. 29; 37 Pac. Rep. 76.

494. After discovery and posting of notice giving the number of feet claimed along the lode on each side of the discovery, the discoverer is protected against subsequent locators during the period allowed by the Colorado statute for perfecting a location. Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

495. A location made on a discovery claim of another, before the time has expired within which the first discoverer must complete his location, is invalid. Craig v. Thompson, 10 Colo. 517; 16 Pac. Rep. 24.

496. "No discovery made after location would make that location valid." Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

497. Though the Colorado statute requires a location to be completed within three months from date of discovery, the location is valid if it is perfected at any time prior to the intervention of an adverse claim. Faxon v. Bernard, 2 McCrary, 44; 4 Fed. Rep. 702; 9 Mor. Min. Rep. 515; 1 Colo. Law Rep. 147.

498. A discovery after location, and before the intervention of an adverse claim, will validate the location from the date of discovery. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Zollars & Highland Chief Cons. M. Co. v. Evans, 2 McCrary, 39; 4 Mor. Min. Rep. 407; Patchen v. Keeley, 19 Nev. 404; 14 Pac. Rep. 347; Wight v. Tabor, 2 L. D. 738; Branagan v. Dulaney, 2 L. D. 744; James Mitchell, 2 L. D. 752.

499. Acts of location may not be made to relate back to the date of the original discovery so as to cut off intervening adverse rights.

Pelican & Dives M. Co. v. Snodgrass, 9 Colo. 339; 12 Pac. Rep. 206.

500. A location without a discovery in the claim is invalid, and a subsequent discovery on the claim will not validate the location. Upton v. Larkin, 5 Mont. 600; 6 Pac. Rep. 66; S. C., 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404. *Contra*, Zollars & Highland Chief Cons. M. Co. v. Evans, 2 McCrary, 39; 4 Mor. Min. Rep. 407.

501. A discovery need not necessarily be made before a location and the filing of the certificate thereof. Strepy v. Stark, 7 Colo. 614: 5 Pac. Rep. 111; 4 West Coast Rep. 663.

502. The place and time of discovery, and the general direction of the vein or lode, must be shown. Silver Jennie Lode, 7 L. D. 6.

503. The forcible ouster of one who has discovered a mineral-bearing lode and has posted a notice of his claim thereon, by a trespasser during the time allowed the discoverer by law to perfect his location, and the prevention of the discoverer from compliance with the law in that regard, excuse him, at least as against such intruder, from a performance of the various acts necessary to a legal location. Erhardt v. Boaro, 113 U. S. 527; 4 Mor. Min. Rep. 432.

504. One who, by force and intimidation, has prevented the discoverer of a lode from perfecting his location, will not be heard to set up the discoverer's failure so to do, as that would be to allow him to profit by his own wrong. Miller v. Taylor, 6 Colo. 41; 9 Mor. Min. Rep. 547.

505. A purchaser from a discoverer, before the location of a claim is completed, must perfect the location within the time allowed from date of discovery. Zeckendorf v. Hutchison, 1 New Mex. 476; 9 Mor. Min. Rep. 483.

506. The first discoverer who completes a legal location within the time allowed therefor is protected against a location previously perfected by a subsequent discoverer. Pelican & Dives M. Co. v. Snodgrass, 9 Colo. 339; 12 Pac. Rep. 206.

507. Where two conflicting locations are made, neither based on a discovery, the second locator has the better right if he first discovers mineral. Crossman v. Pendery, 2 McCrary, 139; 8 Fed. Rep. 693; 1 Colo. Law Rep. 496; 4 Mor. Min. Rep. 431.

508. A location void at the time it made because of no discovery continues remains void, and is not cured by a subquent discovery on the claim located. Upt v. Larkin, 5 Mont. 600; 6 Pac. Rep. 66; S. 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Mi Rep. 404.

509. Where a mineral entry of a place claim taken by legal subdivisions has bee canceled as to that portion of the claim o which the discovery and improvements ar situate, no further time will be allowed within which to make a discovery on every twenty-acre tract remaining or to make an expenditure of $500 thereon, as the location of the claim without such discovery was invalid. Departmental decision of May 20, 1896, In re Eliza Sweeney.

(13) Location.

(See LOCATION, p. 77.)

510. A discovery is a condition precedent to a valid location. Erhardt v. Boaro, 113 U. S. 527; 4 Mor. Min. Rep. 432; O'Reilly v. Campbell, 116 U. S. 418; United States v. Iron Silver M. Co., 128 U. S. 673; Golden Terra M. Co. v. Mahler (Smith), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390; Foote v. National M. Co., 2 Mont. 402; 9 Mor. Min. Rep. 605; Sickel's Min. Dec. 64; Burke v. McDonald, 2 Idaho, 646; 33 Pac. Rep. 49; Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66; R. C. Chambers, 5 L. D. 703; Waterloo M. Co. v. Doe, 17 L. D. 111; Etling v. Potter, 17 L. D. 424.

511. "It [sec. 2320, U. S. Rev. Stat.] allows a claim to be located to the extent of fifteen hundred feet along the vein or lode, but provides that no location shall be made until the discovery of the vein or lode within the limits of the claim located; which is, in effect, a declaration that locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits shall not be permitted. A location can only rest upon an actual discovery of the vein or lode." King v. Amy & Silversmith M. Co., 152 U. S. 222.

512. A discovery of a mineral-bearing vein on vacant public land is essential to a valid location, and the location must embrace the discovery. Golden Terra M. Co. v. Mahler (Smith), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac.

Coast Law Jour. 405; 4 Mor. Min. Rep. 390; Jupiter M. Co. v. Bodie Con. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Winter Lode, 22 L. D. 362; Bryan v. McCaig, 10 Colo. 309; 15 Pac. Rep. 418; Conlin v. Kelly, 12 L. D. 1.

513. A claimant who locates a claim in good faith, as discoverer of a vein afterward found to be part of one great lode underlying a large tract, is entitled to the additional two hundred feet of the vein allowed by law to discoverers. Richmond M. Co. v. Rose, 114 U. S. 576.

514. A. and B. are mining and prospecting partners. A discovery is made but no location. After the dissolution of partnership A. makes a location. *Held*, that B. has no interest in this location. Page v. Summers, 70 Cal. 121; 12 Pac. Rep. 120; 15 Mor. Min. Rep. 617; McLaughlin v. Thompson, 29 Pac. Rep. 816.

515. Where an extra amount of the lode is claimed by right of discovery, and it is subsequently shown by development that the locators were not the discoverers, the location is void, if at all, only as to the excess. Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7. See 114 U. S. 576.

516. Ground actually held and possessed by right of a discovery, even though not located, is reserved from location by a subsequent discoverer. Faxon v. Barnard, 2 McCrary, 44; 4 Fed. Rep. 702; 1 Colo. Law Rep. 147; 9 Mor. Min. Rep. 515.

517. The fact that land on which the discovery and location of a mining claim are made is within the patented limits of a town will not affect the title of the locator where it was known prior to the patent to the town that a mineral vein existed where the discovery and location were made. Moyle v. Bullene (Colo.), 44 Pac. Rep. 69.

518. Discovery with possession but without location is not valid as against a subsequent peaceable location. Horswell v. Ruiz, 67 Cal. 111; 7 Pac. Rep. 197; 15 Mor. Min. Rep. 488; Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429. *Contra*, Phenix M. & M. Co. v. Lawrence, 55 Cal. 143; 12 Mor. Min. Rep. 261.

519. When two locations are based upon one discovery only, one of them can be valid, and the party claiming under one of them must show that one to be valid. McKinstry v. Clark, 4 Mont. 370; 1 Pac. Rep. 759.

520. One discovery may be the basis of two locations. Com'r to Central City Office, Nov. 6, 1889. *Contra*, Poplar Creek Cons. Quartz Mine, 16 L. D. 1; McKinstry v. Clark, 4 Mont. 370; 1 Pac. Rep. 759.

(14) General.

521. A grub-stake contract to be in effect must be in force at date of the discovery by the prospector. Johnstone v. Robinson, 8 McCrary, 42; 16 Fed. Rep. 908.

522. It is well settled that the rights of the miner to the surface ground of his location are dependent upon his discovery and upon the relation which the vein in its course and direction bears to the surface as it has been located. The grant of the vein has always been held to be the principal thing and the surface but an incident, which, as to its extent, is entirely determined by the course of the principal thing granted, to wit, the vein. Colorado Midland Ry. Co. v. Croman, 16 Colo. 381; Patterson v. Hitchcock, 8 Colo. 533; 5 Mor. Min. Rep. 542; Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282; Golden Terra M. Co. v. Mahler (Smith), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

523. It is not necessary that the work by which a lode was discovered and made visible should be done by the locators. It is sufficient if at date of the location the vein was exposed to view, and its existence known to the locator; for these facts would be equivalent to a discovery. Wenner v. McNulty, 7 Mont. 30; 14 Pac. Rep. 643; Jupiter M. Co. v. Bodie Con. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Book v. Justice M. Co., 58 Fed. Rep. 106.

524. The location of a lode claim based on a proper discovery, and made according to law, raises the presumption that the lode extends the length of the claim, and the burden of proof is on one asserting the contrary. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed in 6 Colo. 581; 15 Mor. Min. Rep. 458.) Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

525. "When one has discovered a vein and has complied fully with the law in locating a claim thereon, the territory inclosed within his surface boundaries is segregated

from the public domain in so far as all parties except the government are concerned. . . . The prospector cannot go within such surface boundaries to prospect for mineral veins, and his act, if he do so, is as much trespass as though the land was patented." Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed in 6 Colo. 581; 15 Mor. Min. Rep. 458.)

526. When the validity of a claim depends upon whether a lode has been discovered and located, evidence that such claim contains a vein within its boundaries at places other than at the discovery point is admissible. Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362. See 111 U. S. 350.

527. "The discovery by the defendant of the Dahl lode, two or three hundred feet outside of those boundaries, does not, as observed by the court below, create any presumption of the possession of a vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them." Dahl v. Raunheim, 132 U. S. 260.

528. A discovery need not be shown on each subdivision of a coal claim if the evidence goes to show the presence of coal there. Hamilton v. Anderson, 19 L. D. 168.

529. The mineral character of land may be shown by proof of the existence of mineral thereon. Actual mining operations are not necessary. Johns v. Marsh, 15 L. D. 196.

530. Evidence of discovery must be clear and positive. Robert S. Hale, 3 L. D. 536; Silver Jennie Lode, 7 L. D. 6.

531. Assays of rock taken from the claim subsequent to the location may tend to show that, at date of the location, a vein of mineral-bearing rock had been discovered. Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; 9 Mor. Min. Rep. 513.

532. Discovery will be presumed from the fact of location, unless there are allegations to the contrary. Sprucemont M. Co. v. Lewis, Sickel's Min. Dec. 214; Cheesman v. Shreeve, 40 Fed. Rep. 787; Cheesman v. Hart, 42 Fed. Rep. 98.

533. Discovery will be presumed where there is no adverse claim filed or fraud shown, and the evidence is conflicting on that point. Wight v. Tabor, 2 L. D. 741.

534. A. locates with no discovery. He may hold it as against B., who has made no discovery. Field v. Grey, 25 Pac. Rep. 793.

535. An entry was held for cancellation because no discovery was shown. Claimant allowed six months to show such discovery. (Not a precedent.) Departmental decision of October 27, 1893, In re Blake Placer.

536. A discovery must be shown on that portion of the claim which the court decides applicant entitled to. Northwestern Lode, 8 L. D. 437.

537. A waiver of the original discovery does not interfere with development and possession of the claim. Gustavus Hagland (on review), 1 L. D. 593.

538. A discovery need not necessarily be shown on land added by amendment to a location, where such land is reported as mineral and good faith is unquestioned. Lincoln Placer, 7 L. D. 81.

539. Deputy surveyor acts for claimant, and is not required to discover or show the course of the vein. Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282; Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463.

6. *End Lines.*

(See SURVEY, p. 137.)

540. Where a lode leaves a claim through a side line, the strike is terminated by the plane of such side line, and the right to follow the vein on its dip, conferred by section 2322, United States Revised Statutes, is determined by a vertical plane parallel to the end lines, drawn downward, and which takes effect at the point where the apex intersects the side line. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607; Iron Silver M. Co. v. Elgin M. & Sm. Co., 118 U. S. 196; 15 Mor. Min. Rep. 641; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478; Tyler M. Co. v. Last Chance M. Co., 7 U. S. App. 463; 6 Fed. Rep. 463. (See 157 U. S. 683.) Fitzgerald v. Clark, 157 U. S. 696; 42 Pac. Rep. 273; Colorado Central Cons. M. Co. v. Turck, 4 U. S. App. 290; 12 U. S. App. 85; 50 Fed. Rep. 88; Last Chance M. Co. v. Tyler M. Co., 9 U. S. App. 613; 61 Fed. Rep. 557; Tyler M. Co. v. Sweeney, 4 U. S. App. 329; 54 Fed. Rep. 284; Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. Rep. 540; Del Monte M. & M. Co. v. New York & Last Chance M. Co., 66 Fed. Rep. 212; Tyler M. Co. v. Last Chance M. Co., 71 Fed. Rep. 848; Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597; Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep.

557. (See Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Law Rep. 304.) King v. Amy & Silversmith Cons. M. Co., 9 Mont. 543; 24 Pac. Rep. 200; Tombstone M. & M. Co. v. Way Up M. Co., 25 Pac. Rep. 794; Watervale M. Co. v. Leach, 33 Pac. Rep. 418; Wilhelm v. Sylvester, 101 Cal. 358; 35 Pac. Rep. 997.

541. Where the end lines of a lode claim are not drawn so as to secure all rights possible under the law, the locator must bear the consequences. The court cannot relocate the claim, making new lines therefor. The most that it can do, where the lines are drawn inaccurately and irregularly, is to give the claimant such rights as his imperfect location warrants, under the law. King v. Amy & Silversmith M. Co., 152 U. S. 222. (Reversing 9 Mont. 543; 24 Pac. Rep. 200.)

542. If a lode departs from the side line of a claim, the claimant may voluntarily abandon his claim beyond the point of such departure, and establish an end line at that point. Last Chance M. Co. v. Tyler M. Co., 15 U. S. App. 456. See 157 U. S. 683.

543. If the lode leaves the location at a point on a side line, the right to follow it on its strike ceases at point of intersection of the lode with the side line. Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282; Johnson v. Buell, 4 Colo. 557; 9 Mor. Min. Rep. 502.

544. "If the lode located terminates at any point within the location, or departs at any point from the side lines, the location beyond that point is defeasible if not void." Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542; Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

545. Where the location was made under the act of 1866, and had not parallel end lines, for the purpose of bounding the rights to follow the lode on its dip, end lines will be drawn parallel, at each end, at right angles to the general course of the vein. Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 5 Mor. Min. Rep. 578.

546. If a location be laid crosswise of a lode or vein, so that its greatest length crosses the same instead of following the course thereof, it will secure only so much of the vein as it actually crosses at the surface, and the side lines of the location will become the end lines thereof, for the purpose of defining the rights of the owners. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607; King v. Amy & Silversmith Cons. M. Co., 152 U. S. 222; Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683.

547. Where a mining claim is located across a vein or lode instead of along it, those lines of the claim are side lines which, in their length, show the length claimed along the vein or lode, and those lines of the claim intersected by the lode on its course or strike are the end lines. Argentine M. Co. v. Terrible M. Co., 122 U. S. 478.

548. "Side lines, properly drawn, would run on each side of the course of the vein or lode distant not more than three hundred feet from the middle of such vein." If they are so drawn as to be intersected by the course of the lode, they are, in fact, end lines, and will be so considered in determining the right of the claimant to follow the lode outside the surface lines of his claim. King v. Amy & Silversmith M. Co., 152 U. S. 222.

549. Extralateral rights to work a lode other than the one specifically located are governed by the end lines as located, in the same manner as extralateral rights to work the lode located. Walrath v. Champion M. Co., 63 Fed. Rep. 552.

550. "Under the act of 1866 (14 Stat. 251), parallelism in the end lines of a surface location was not required; but where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines. His lateral right by the statute is confined to such portion of the vein as lies between such planes drawn through the end lines and extended in their own direction, that is, between parallel vertical planes. It can embrace no other portion." Iron Silver M. Co. v. Elgin M. & Sm. Co. (Horseshoe Case), 118 U. S. 196; 15 Mor. Min. Rep. 641.

551. Non-parallelism of the end lines will not defeat the right of the locator on the apex of a lode to follow the lode on its dip, if the end lines converge in the direction of the dip, as the non-parallelism in that case would only operate to restrict the rights of the claimant. Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597.

552. The fact that, as located, the end lines of a claim were not parallel, does not render

the location void, the lines having been made parallel before the intervention of adverse rights. Doe v. Waterloo M. Co., 54 Fed. Rep. 935; Doe v. Sanger, 88 Cal. 203; 23 Pac. Rep. 365.

553. The provisions of the statute requiring the end lines of a claim to be parallel is merely directory, and no consequence is attached to a deviation. Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 9 Mor. Min. Rep. 578; Horswell v. Ruiz, 67 Cal. 111; 7 Pac. Rep. 197; 15 Mor. Min. Rep. 488.

554. The end lines of a lode claim must be substantially parallel. Cheesman v. Shreeve, 40 Fed. Rep. 787.

555. The validity of the location is not affected by a slight divergence of the end lines. Doe v. Sanger, 88 Cal. 203; 23 Pac. Rep. 365.

556. The end lines of a lode claim as surveyed must be parallel. Philadelphia M. Co. v. Pride of West Lode, 3 C. L. O. 82; Instructions to Surveyor-General, Sept. 13, 1878, 5 C. L. O. 100.

557. The end lines of a lode claim must be at right angles to the lode. Elgin M. & Sm. Co. v. Iron Silver M. Co., 14 Fed. Rep. 880.

558. The end lines of a lode claim should be at right angles to the side lines. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

559. A location of a lode claim in the form of a triangle, *i. e.*, having only one end line, gives the locator no right to follow his lode outside of the surface lines of his location. Montana Co. v. Clark, 42 Fed. Rep. 626.

560. Each locator is entitled to follow the dip of his lode or vein to an indefinite depth, though it carries him outside of the side lines of his location; but this right is based on the hypothesis that the side lines substantially correspond with the course of the lode or vein at the surface; and it is bounded at each end by the end lines of the location crossing the lode or vein, and extended perpendicularly downward indefinitely in their own direction. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 429.

561. A location properly made gives the locator the right to the vein upon which the location is based, and to all other veins having their apexes in the location, with the right to follow the same on the dip between perpendicular planes passed through parallel end lines. Iron Silver M. Co. v. Cheesman, 2 McCrary, 191; 9 Mor. Min. Rep. 552.

562. The locator of the apex of the vein may follow it outside of his side lines wherever it may go within perpendicular planes passed through parallel end lines. Iron Mine v. Loella Mine (S. C., Iron S. M. Co. v. Murphy), 2 McCrary, 121; 3 Fed. Rep. 388; 1 Colo. Law Rep. 16; 1 Mor. Min. Rep. 548.

563. The locator of the apex of the vein, entirely within the surface lines of his claim for a portion of its length, and for the remaining portion partly within and partly without and within the surface lines of another claim, but never entirely departing from such first location, owns the entire lode within the end lines of his claim. Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 3; 11 Pac. Rep. 515.

564. The lode may not be followed on its strike outside the lines of the location. Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

565. The owner of a vein or lode may follow it outside of the perpendicular extension of the side lines of the claim, but not outside of its end lines. Reynolds v. Iron Silver M. Co., 116 U. S. 687.

566. Where an adverse claim is compromised by allowing applicant to secure patent, and title to both claims becomes vested in one person, he must, as to his right to follow on their dip the lodes found in the conflict, depend upon title to the patented claim. Del Monte M. & M. Co. v. New York & Last Chance M. Co., 66 Fed. Rep. 212. (Follows Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607, in the principle that the locator must establish his end line where the lode departs from the assumed course and intersects the side line.)

CITIZENSHIP.

I. The Statutes.
II. Regulations.
III. Decisions.

I. The Statutes.

Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on

his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation. 17 Stat. 94; 19 Stat. 52; sec. 2321, U. S. Rev. Stat.

AN ACT to amend section twenty-three hundred and twenty-six of the Revised Statutes, in regard to mineral lands, and for other purposes.

. . . . . .

SEC. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any State or Territory.

Approved April 26, 1882. (22 Stat. 49.)

II. REGULATIONS.

27. By section 2325 authority is given for granting titles for mines by patent from the Government to any person, association, or corporation having the necessary qualifications as to citizenship and holding the right of possession to a claim in compliance with law.

76. The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge or upon information and belief, setting forth the residence of each person forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

77. In case of an individual or an association of individuals who do not appear by their duly authorized agent, you will require the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence.

78. In case an applicant has declared his intention to become a citizen or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

79. The affidavit of the claimant as to his citizenship may be taken before the register or receiver, or any other officer authorized to administer oaths within the land district; or, if the claimant is residing beyond the limits of the district, the affidavit may be taken before the clerk of any court of record or before any notary public of any State or Territory.

80. If citizenship is established by the testimony of disinterested persons, such testimony may be taken at any place before any person authorized to administer oaths, and whose official character is duly verified.

III. DECISIONS.

1. Only citizens and those who have declared their intention to become citizens are authorized to claim and locate mines. Kempton Mine, 1 C. L. O. 178; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

2. Mineral lands of the United States are open to exploration and purchase only by citizens and those who have declared their intention to become such. O'Reilly v. Campbell, 116 U. S. 418.

3. A resident of the United States is *prima facie* a citizen. Jantzen v. Arizona Copper Co., 20 Pac. Rep. 93.

4. A minor may make a mineral location if a citizen of the United States. Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182; Com'r to Francis Cunningham, 7 C. L. O. 179; Com'r to Thomas Price, July 1, 1891; Com'r to N. P. Stilson, June 15, 1893.

5. No distinction on account of sex is made. Com'r to Eureka Office, Nov. 18, 1877, 4 C. L. O. 179.

6. "Married women, who are citizens of the United States or who have declared their intention to become such, may locate and secure patent for mining claims, upon due compliance with law." Com'r to A. R. Dickey, Dec. 9, 1891.

7. A married woman, an alien by birth, acquires citizenship to such an extent as to qualify her to make an entry of public land, where her husband has declared his intention to become a citizen. Bogart v. Daniels, 18 L. D. 528.

8. A mining claimant must show citizenship when it is denied. Wood v. Aspen M. & S. Co., 36 Fed. Rep. 25. (But see Billings v. Aspen M. & S. Co., 51 Fed. Rep. 338; 10 U. S. App. 332.)

9. One claiming by purchase a mining location must allege citizenship of the locator. Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419.

10. The heirs of a decedent who make entry must show citizenship. Gulch & Lake View Lodes, Com'r to Durango Office, Feb. 14, 1896.

11. If citizenship is alleged and the allegation is not controverted, that is sufficient under the law. Mono M. Co. v. Magnolia Co., 2 C. L. O. 68; John Mooney, 3 C. L. O. 68 (form of affidavit prescribed).

12. A claimant's own affidavit is *prima facie* proof of his citizenship in all proceedings under Chapter 6, Title XXXII, United States Revised Statutes. North Noonday M. Co. v. Orient M. Co., 11 Fed. Rep. 125.

13. An affidavit of citizenship made by a mineral claimant is not only good evidence under the law, before the Land Department, but in any proceeding based on Chapter 6, Title XXXII, United States Revised Statutes. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 503 (motion for new trial).

14. An affidavit of citizenship by an applicant for patent, made outside of the United States, must be made before a United States consular officer. Com'r to Durango Office, Sept. 19, 1895, *In re* Last Chance Lode.

15. The oath to a notice of location required by the Montana statutes, in which it is asserted by one of several locators that all of the locators are citizens of the United States, is *prima facie* proof of such citizenship. Hammer v. Garfield M. & M. Co., 130 U. S. 291.

16. Evidence that one whose citizenship is in question has voted is admissible as tending to show citizenship. S. P. R. R. Co. v. Brown, 9 L. D. 173.

17. Evidence of voting may raise a presumption of citizenship, as fraud on the part of a voter is not presumed. Jones v. S. P. R. R. Co., 19 L. D. 270.

18. In an application for a patent, proof of citizenship of original locators or intermediate owners is not required. B. N. Sanford, 1 C. L. O. 98.

19. In the absence of evidence to the contrary, locators are presumed to be citizens or to have declared their intention to become such. Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153.

20. Locators must be citizens. A transfer by an alien to citizens does not cure the defect, and the claim of the transferee is not good. The presumption, however, is in favor of the locator's qualification. Want of qualification must be proven. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; Departmental decision of January 2, 1893.

21. Where an application is made by a trustee, citizenship of the *cestui que trust* must be shown. Circular of June 8, 1883, 2 L. D. 725; Capricorn Placer, 10 L. D. 641.

22. The child of an American citizen born abroad is a citizen of the United States. Gaby v. Thompson, 19 L. D. 282.

23. The marriage of an alien widow residing in the United States, to a citizen during the minority of the widow's child, renders the child a citizen. State v. Newell, 45 N. Y. St. Rep. 38; United States v. Keller, 11 Biss. 314; Com'r to Pueblo Office, Feb. 8, 1896.

24. Mexicans residing in California at the time of its cession to the United States became citizens of the United States, unless they elected otherwise within one year (9 Stat. 922–929). Jones v. S. P. R. R. Co., 19 L. D. 270; Aubrey v. Clapp, 8 C. L. O. 193.

25. An Indian born within the territorial limits of the United States, who has abandoned the tribal relation and adopted the customs of civilized life, is a citizen of the United States, under section 6 of the act of February 8, 1887 (24 Stat. 388). Turner v. Holliday, 22 L. D. 215.

26. The fact that a party was not a citizen before disposing of the claim must be affirmatively shown by an adverse claimant. Kempton Mine, 1 C. L. O. 178.

27. A foreigner may make a mining location and dispose of it, provided he becomes a citizen before transferring his title. Kempton Mine, 1 C. L. O. 178.

28. An adverse complaint must allege citizenship of the adverse claimant. North Noonday Mining Co. v. Orient Mining Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217; Keeler v. Trueman, 15 Colo. 143; 25 Pac. Rep. 311; McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076; Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324; Lee Doon v. Tesh, 6 Pac. Rep. 97.

29. On an adverse suit the complaint must set out citizenship of plaintiff and his grantors. Keeler v. Trueman, 15 Colo. 143; 25 Pac. Rep. 311.

30. Where an adverse complaint by two persons alleges citizenship of one only, on de-

murrer, suit will be dismissed as to the other plaintiff. Lee Doon v. Tesh, 68 Cal. 43; 8 Pac. Rep. 621.

31. The testimony of one plaintiff that he was a citizen of the United States at the time of location and that the other plaintiffs were his children, born in California, is sufficient proof of citizenship of the plaintiffs at the time of location by them. Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182.

32. On an adverse suit, if citizenship has not been shown, the omission is fatal to the party's right of recovery. O'Reilly v. Campbell, 116 U. S. 418.

33. On adverse suit, proof of citizenship may consist, in case of an individual, of his own affidavit thereof, and in case of an association of persons unincorporated of the affidavit of their authorized agent made upon his own knowledge or upon information and belief. O'Reilly v. Campbell, 116 U. S. 418.

34. In a suit for trespass upon a mining location the plaintiff must show citizenship, and if the defendant justifies under another location, he must show citizenship, as no rights could be acquired by a location without such qualification. Bohanon v. Howe, 2 Idaho, 417; 17 Pac. Rep. 583.

35. Citizenship of plaintiff need not be alleged in a declaration in trespass. Jackson v. Dines, 13 Colo. 90; 21 Pac. Rep. 918; McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076. *Contra*, Bohanon v. Howe, 2 Idaho, 417; 17 Pac. Rep. 583.

36. In actions under section 2326, United States Revised Statutes, objections as to citizenship cannot be taken in the United States supreme court for the first time. O'Reilly v. Campbell, 116 U. S. 418.

37. In case where an agent makes an affidavit of citizenship of claimants he must show that he is authorized. Com'r to Shasta Office, Nov. 28, 1878, 5 C. L. O. 146.

38. A patent issued to a citizen as trustee for an alien may not be attacked collaterally by third persons. Justice M. Co. v. Lee, 40 Pac. Rep. 444.

39. If a mineral entry is made by one as trustee for others, the nature of the trust, and the names and citizenship of the beneficiaries must be shown. Com'r to H. W. Taylor, Feb. 20, 1892, *In re* Nevada Copper Lode.

40. A mineral entry made by a citizen, for the benefit of an alien corporation, is illegal and will be canceled. Capricorn Placer, 10 L. D. 641; Hook v. Latham, 11 L. D. 425.

41. Instructions as to disposition of an application, where several co-owners refuse to execute affidavits of citizenship. Com'r to Durango Office, Oct. 22, 1888, 15 C. L. O. 169.

42. A corporation is a citizen and an individual. Telford v. Keystone Lumber Co. (review), 19 L. D. 141.

43. A corporation is a citizen of the State where incorporated. Ohio & Mississippi R. R. Co. v. Wheeler, 1 Black, 256; Eaton v. St. Louis M. & Sm. Co., 7 Fed. Rep. 139.

44. The stockholders of a United States corporation are presumed to be citizens of the United States. Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

45. A corporation may locate, but the qualifications of a corporation should be pleaded. Thomas v. Chisholm, 13 Colo. 105; 21 Pac. Rep. 1019.

46. A corporation organized under the laws of a State is a citizen of the United States and may take and hold a mining claim. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

47. A corporation created under the laws of one of the United States, all of whose members are citizens of the United States, is competent to locate, or join with others, in the location of a mining claim. As to whether or not it can locate more land in one claim than an individual locator, *quære*. McKinley v. Wheeler, 130 U. S. 630.

48. A duly qualified corporation may locate a mill site under the provisions of section 2337 of the United States Revised Statutes, and maintain an adverse claim in defense of its location. Bay State Gold M. Co. v. Trevillion, 10 L. D. 194.

49. A corporation, applicant for a mining patent, must show compliance with local requirements in the matter of filing its articles of incorporation with the proper officer, but if such evidence is on file in one entry, reference may be made thereto in subsequent entries in lieu of again furnishing the same. Alta Mill Site, 8 L. D. 195; 9 L. D. 48 (review).

50. A corporation organized under the laws of a State other than the one in which it proposes to acquire title to mines, must show compliance with the State law in which it is proposed to do business. Hidden Treasure G. & S. M. Co., 16 C. L. O. 110.

51. A corporation must furnish evidence showing that it has been duly incorporated, and authorized to do business under the laws of the State in which it is operating. Gold Hill & Lee Mountain M. Co., 16 C. L. O. 110.

52. Proof of citizenship of a corporation under the United States mining law, may consist of a certificate by the proper officer that the company is incorporated. A certified copy of the articles of incorporation need not be furnished. Silver King M. Co., 20 L. D. 116. (Reversing the Commissioner in requiring a certified copy of the articles of incorporation.)

53. A properly authenticated certificate of the existence of a corporation, applicant for a mineral patent, is sufficient proof of citizenship under the statute. It is not within the province of the Land Department to inquire into the authority of a corporation under its charter, to take title for mineral lands. Rose Nos. 1 and 2 Lodes, 22 L. D. 83.

54. The right of a corporation to hold a mining claim may not be questioned by a stranger. Butte Hardware Co. v. Schwab, 34 Pac. Rep. 24.

55. A corporation formed for other than mining purposes cannot receive a patent for mineral lands from the United States. Buena Vista Electric Light Co., 18 C. L. O. 208; Com'r to Las Cruces Office, Dec. 16, 1892, Magdalena Land & Cattle Co. *Contra*, Com'r to Coeur d'Alene Office, Oct. 4, 1895, *In re* Paymaster Lode; Silver King M. Co., 20 L. D. 116; Rose Nos. 1 and 2 Lodes, 22 L. D. 83.

56. Foreign corporations claiming as transferees under United States mining patents have the same rights as the original patentees. William W. Ramage, 2 C. L. O. 115.

57. A citizen of the United States, acting as the trustee of an alien corporation, cannot make entry for the benefit of such corporation. Where the applicant is a trustee, proof of citizenship of beneficiaries is required. Capricorn Placer, 10 L. D. 641; Hook v. Lathan, 11 L. D. 425; Circular of June 8, 1883, 2 L. D. 725.

58. A party to an adverse suit, claiming under a relocation made by a corporation, must allege and prove such corporation to have been organized in some of the States or Territories of the United States, and that its members were individually qualified to make the location. Thomas v. Chisholm, 13 Colo. 105; 21 Pac. Rep. 1019.

59. The authority of an official or agent of a corporation to make application for patent must be shown. Com'r to John W. Eddy, Sept. 21, 1891, and Oct. 21, 1891.

60. A corporation interested in mining may be represented by an officer or agent at a meeting of miners called to frame district rules and regulations. McKinley v. Wheeler, 130 U. S. 630.

61. In a Territory, a corporation must furnish evidence showing whether exceeding twenty *per centum* of the stock of said corporation is "owned by any person or persons, corporation or corporations, association or associations not citizens of the United States." Act approved March 3, 1887 (24 Stat. 476). Gold Hill & Lee Mountain M. Co., 16 C. L. O. 110.

62. The statute of limitations of Nevada except foreign corporations from their protection. Robinson v. Imperial S. M. Co., 5 Nev. 44; Barstow v. Silver M. Co., 10 Nev. 386; Union Cons. S. M. Co. v. Taylor, 100 U. S. 37; 5 Mor. Min. Rep. 323.

63. "Naturalization has a retroactive effect so as to be deemed a waiver of all liability to forfeiture, and a confirmation of his former title." Osterman v. Baldwin, 6 Wall. 116; Jackson v. Beach, 1 Johns. Cas. 399; Com'r to Carson City Office, July 13, 1876, Sickel's Min. Dec. 76.

64. An alien twenty-one years of age, who is honorably discharged after serving an enlistment in the United States army, occupies the *status* of one who has declared his intention to become a citizen (sec. 2166, U. S. Rev. Stat.). Smith v. United States, 16 L. D. 352; Com'r to Patrick Driver, Oct. 7, 1891, same effect.

65. The oath of citizenship, when taken in accordance with law, confers upon the alien the rights of a citizen, even without the formal action of the court. Gilmore v. Pallett, 16 L. D. 102. (Citing Campbell v. Gordon, 6 Cranch, 176; John Skelton, 4 L. D. 107.)

66. A mining claimant who was born in Canada and served in the United States army during the late war cannot, on that account, be treated as a citizen, but must take out final naturalization papers. John McNeill, 17 C. L. O. 41.

67. The naturalization of an alien by a court not having a clerk will not be recognized by the Land Department. J. F. Hecht-

man, 1 L. D. 61. (Overruled in Joseph Barker, 1 L. D. 88.)

68. The naturalization of an alien claimant to public land will relate back to the initiation of his right, in the absence of an intervening adverse claim. Phillips v. Sero, 14 L. D. 568.

69. A declaration of intention to become a citizen by an alien who does not complete his naturalization during the minority of his child confers upon the child the *status* of one who has declared his intention. Meriam v. Poggi, 17 L. D. 579; Somers v. Heuer, 19 L. D. 507.

70. An unincorporated association of citizens owning separate and distinct interests may unite their means and expend the $500 required by the mining laws at one point, and thereafter secure patent. Dudley Chase, 2 C. L. O. 114.

71. An alien may neither locate nor hold a mining claim. Lee v. Justice M. Co., 29 Pac. Rep. 1020; Bohanon v. Howe, 2 Idaho, 417; 17 Pac. Rep. 583; Lee Doon v. Tesh, 68 Cal. 43; 8 Pac. Rep. 621; Territory v. Lee, 2 Mont. 124; 6 Mor. Min. Rep. 248; Anthony v. Jillson, 88 Cal. 296; 28 Pac. Rep. 419; Wulff v. Manuel, 9 Mont. 279; 28 Pac. Rep. 728; Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

72. An alien can acquire no rights under the mineral land laws. Chapman v. Toy Long, 4 Sawy. 28; 1 Mor. Min. Rep. 497.

73. No act by an alien who has not declared his intention to become a citizen can confer upon him any right to public land. N. P. R. R. Co. v. Collins, 14 L. D. 484.

74. An alien cannot locate, possess, purchase or acquire title by patent to mineral land. Tibbitts v. Ah Tong, 4 Mont. 586.

75. An alien, though he may not locate nor enter public lands, may, until office found, hold a mining claim under possessory title as grantee of a qualified locator. Ferguson v. Neville, 61 Cal. 356.

76. The title of a claimant of the public mineral lands as locator of a mining claim may not be questioned on the ground of alienage by any one excepting the United States, or in proceedings to obtain a United States patent. (Adverse suit.) Billings v. Aspen M. & Sm. Co., 51 Fed. Rep. 338; 10 U. S. App. 1, 322; Wood v. Aspen M. & Sm. Co., 36 Fed. Rep. 25.

77. Alienage is not a disability that may be taken advantage of by a private person nor by any other than the sovereign to whom the property would revert or escheat upon declaration of forfeiture. Territory v. Lee, 2 Mont. 124; 6 Mor. Min. Rep. 248.

78. The alienage of a mineral claimant may be set up only by the United States or by the State, except in adverse proceedings under the mining law, when it may be shown by an adverse claimant for the purpose of defeating the application. Billings v. Aspen M. & Sm. Co., 52 Fed. Rep. 250.

79. An alien may hold a mining claim as against every one but the United States or one claiming under it. Billings v. Aspen Con. M. Co., 51 Fed. Rep. 338; 10 U. S. App. 1, 322.

80. A location by one not a citizen, and who has not declared his intention to become a citizen, is invalid. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

81. A location by an alien is validated by his declaration of intention of becoming a citizen before the intervention of adverse rights. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

82. Though a claim to public land may be initiated, under the law, only by a citizen or one who has declared his intention to become one, a subsequent declaration will relate back to date of initiation of his claim, if made before the intervention of any adverse rights. Man v. Huk, 3 L. D. 459; Ole Krogstad, 4 L. D. 564; Soustilie v. Lowery, 6 L. D. 15; Jacob H. Edens, 7 L. D. 229; Paul O. Brewster, 7 L. D. 471; Lyman v. Elling, 10 L. D. 474; Kirkpatrick v. Brinkman, 11 L. D. 71; Birtch v. Cuddigan, 11 L. D. 121; C. P. R. R. Co. v. Taylor, 11 L. D. 354; Croesus M. Co. v. Colorado Land & M. Co., 19 Fed. Rep. 78; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

83. The defendant at the time of filing application for patent was an alien; his application was adversed, and on the day of trial defendant was naturalized. *Held*, that his act of naturalization could not retroact to his purchase or to his acquisition of possessory right to a mining claim upon the public domain. Wulff v. Manuel, 9 Mont. 279; 28 Pac. Rep. 728. (Reversed, S. C., 152 U. S. 505.)

84. A conveyance of a mining claim by a qualified locator to an alien does not operate as an abandonment of the claim, but the alien may hold the claim as against all but the United States; and where the alienage of an applicant is set up by an adverse claimant, the declaration of intention to become a citizen, made by the applicant during the pendency of the adverse suit, but before judgment, will render his title good as far as citizenship is concerned. Manuel v. Wulff, 152 U. S. 505. (Reversing 9 Mont. 279; 23 Pac. Rep. 723. Citing Man v. Huk, 3 L. D. 452; Ole Krogstad, 4 L. D. 564; Lord v. Perrin, 8 L. D. 536; Jackson v. Beach, 1 Johns. Cas., 399; Goveneur v. Robertson, 11 Wheat. 332; Osterman v. Baldwin, 6 Wall. 116.)

85. A claim to public land, illegally initiated by an alien, may not be validated by a subsequent declaration of intention to become a citizen in the face of an intervening adverse right. C. P. R. R. Co. v. Taylor, 11 L. D. 354.

86. A location by an alien is void and is not validated by a subsequent declaration of intention. Anthony v. Jillson, 88 Cal. 296; 23 Pac. Rep. 419.

87. An alien after declaration of intention may take advantage of previous acts under the mining law. Ole Krogstad, 4 L. D. 564; Croesus Co. v. Colorado Co., 19 Fed. Rep. 78.

88. An alien in actual possession of public land will be protected against a naked trespasser not claiming under government title. Courtney v. Turner, 12 Nev. 345.

89. An alien who has not declared his intention to become a citizen cannot hold mines as a locator against a citizen who shows title by complying with mining law. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; Territory v. Lee, 2 Mont. 124; 6 Mor. Min. Rep. 248.

90. A transfer to an alien is an abandonment of the locator's right. Lee v. Justice M. Co., 29 Pac. Rep. 1020.

91. The conveyance of a mining location by a qualified locator to an alien is not an abandonment of the location, but the alien may hold as against all but the State or the United States, and a conveyance by him to a citizen carries good title. Gorman M. Co. v. Alexander, 2 S. D. 557; 51 N. W. Rep. 346.

92. A mining claim passing into the possession of an alien, although located by a citizen, reverts to the government, and may be relocated. Tibbitts v. Ah Tong, 4 Mont. 536.

93. A mining claim sold to an alien cannot be patented, unless such alien declares his intention, by which his right will relate back to his purchase. William S. Wood, 3 C. L. O. 69.

94. Aliens cannot hold a mining claim prior to the issuance of patent therefor, and a purchaser from an alien of an unpatented mine acquires no title thereto. Beckner v. Coates, 3 C. L. O. 18.

95. A purchaser from an alien may relocate the claim and thereby acquire a possessory title. Beckner v. Coates, 3 C. L. O. 18.

96. If an alien locates and performs all acts necessary to a valid location, and then sells to a citizen, such citizen thereby acquires and holds a valid title as against all persons having no right therein before conveyance by the alien. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

97. Locators and intermediate owners of mining claims will not be presumed aliens in the absence of allegation to that effect prior to the issuance of patent. Wandering Boy Lode, 2 C. L. O. 2.

98. Where a location is made by a citizen and an alien, and the alien thereafter declares his intention of becoming a citizen, the citizen cannot, by relocation, cut his co-owner out, on the ground that the original location was void so far as the alien is concerned. Sever v. Gregovich, 16 Nev. 325.

99. One who claims under a location may not defeat the right of one of the locators to a share of the proceeds of the mine by alleging alienage of such locator. Billings v. Aspen M. & Sm. Co., 52 Fed. Rep. 250.

100. The fact that one of several locators is an alien does not invalidate the location as to those qualified to locate. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 456.

101. Alienage of one of several locators who do not locate more than might have been located without the alien does not affect the validity of the location as to those qualified to locate. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

102. A Territory cannot pass laws affecting the right of aliens to hold and work mining claims. Territory v. Lee, 2 Mont. 124; 6 Mor. Min. Rep. 248.

103. A Territory cannot declare or enforce a forfeiture of a mining claim located or held by an alien. Territory v. Lee, 2 Mont. 124; 6 Mor. Min. Rep. 248.

104. A patent issued to a citizen as trustee for an alien may not be attacked collaterally (by third person). Justice M. Co. v. Lee, 40 Pac. Rep. 444.

105. Alien tenure act approved March 8, 1887 (24 Stat. 476), applies to mines. Opinion of Attorney-General, May 20, 1887, 14 C. L. O. 126.

106. An entry made by a Chinaman, even though he were naturalized, is void, and will be canceled, because such naturalization was contrary to the plain provisions of section 2169, United States Revised Statutes, as amended by the act of February 18, 1875 (18 Stat. 318). Chung Choy, 15 C. L. O. 147.

107. A mineral entry made by an alien is not void, but voidable, and while of record the land covered thereby is segregated from the public domain. Ole Krogstad, 4 L. D. 564; Leary v. Manuel, 12 L. D. 345.

108. A location of land covered by a mineral entry is *void*, the entry while it remains of record being a segregation of the land (notwithstanding the alienage of the entryman), and such a location would not give the locator even the right of appeal from a decision dismissing his protest. Leary v. Manuel, 12 L. D. 345.

109. Natives of Alaska are not Indians. John Brady, 19 L. D. 323.

SURFACE GROUND, APEX, DIP.

I. THE STATUTES.
II. REGULATIONS.
III. DECISIONS.
1. *Surface Ground.*
2. *Apex, Dip.*

I. THE STATUTE.

The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. 13 Stat. 441; 17 Stat. 91; 19 Stat. 52; secs. 910 and 2322, U. S. Rev. Stat. See, also, sec. 2336, U. S. Rev. Stat.

II. REGULATIONS.

2. By an examination of the several sections of the Revised Statutes it will be seen that the *status* of lode claims located *previous* to the 10th May, 1872, is not changed with regard to their *extent along the lode or width of surface.*

3. Mining rights acquired under such previous locations are, however, enlarged by such Revised Statutes in the following respect, viz.: The locators of all such previously taken veins or lodes, their heirs and assigns, so long as they comply with the laws of Congress and with State, Territorial, or local regulations not in conflict therewith, governing mining claims, are invested with the exclusive possessory right of all the surface included within the lines of their locations, and of all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such locations at the surface, it being expressly provided, however, that the right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as aforesaid, through the end-lines of their locations so continued in their own direction that such planes will intersect such exterior parts of such veins, lodes, or ledges; no right being granted, however, to the claimant of such outside portion of a vein or ledge to enter upon the surface location of another claimant.

4. It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, *other* than the one named in the original location, to such as were not *adversely claimed on May 10, 1872*, and that where such other vein or ledge was so adversely claimed at that date, the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

7. Rights under patents for veins or lodes heretofore granted under previous legislation of Congress are enlarged by the Revised Statutes so as to invest the patentee, his heirs or assigns, with title to all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies within the end and side boundary lines of his claim on the surface, as patented, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of the claim at the surface. The right of possession to such outside parts of such veins or ledges to be confined to such portions thereof as lie between vertical planes drawn downward through the end-lines of the claims at the surface, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges; it being expressly provided, however, that all veins, lodes, or ledges, the top or apex of which lies inside such surface locations, *other* than the one named in the patent, which were *adversely claimed on the 10th May, 1872*, are excluded from such conveyance by patent.

8. Applications for patents for mining claims pending at the date of the act of May 10, 1872, may be prosecuted to final decision in the General Land Office, and where no adverse rights are affected thereby, patents will be issued in pursuance of the provisions of the Revised Statutes.

9. From and after the 10th May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet*, but in no event can a location of a vein or lode made subsequent to May 10, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

10. With regard to the extent of surface-ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case *exceed three hundred feet on each side of the middle of the vein at the surface*, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end-lines of such claims to be in all cases parallel to each other. Said lateral measurements cannot extend beyond three hundred feet on *either* side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet cannot be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration *where* the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

11. By the foregoing it will be perceived that no lode-claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface-ground of that width can be taken, depends upon the local regulations or State or Territorial laws in force in the several mining-districts; and that no such local regulations or State or Territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width, unless adverse claims existing on the 10th day of May, 1872, render such lateral limitation necessary.

III. Decisions.

1. *Surface Ground.*

1. Locators of mining claims, so long as they comply with the law, have "the exclusive right of possession and enjoyment of all the surface included within the lines of their location." This is a right of property, and the claimant must protect himself from trespassers by proceedings in court. Lewis Smith, 1 L. D. 615.

2. The locator of a mining claim who maintains his location has the sole right of possession to the surface ground included therein. Atkins v. Hendree, 1 Idaho, 95; 2 Mor. Min. Rep. 328; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

3. The exclusion from an application for patent of that portion of the claim containing the discovery renders it incumbent upon the applicant to show a discovery of mineral upon claimed ground. Cayuga Lode, 5 L. D. 703; Silver Jennie Lode, 7 L. D. 6.

4. "However tortuous might be the course of the lode, the claimant had a perfect right to follow it up and prepare his diagram so as to include it, together with the surface ground on each side thereof allowed by local laws.

There is no language in the acts that requires the diagram to be in the form of a parallelogram or in any particular form." Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

5. The mere right to mine does not carry any right to the surface for any other purpose. Dietz v. Mission Transfer Co., 25 Pac. Rep. 423.

6. A location is valid only to the extent of the lode included therein, as the surface is held in connection with the lode. Terrible M. Co. v. Argentine M. Co., 5 McCrary, 639.

7. The right to surface ground of a lode claim is dependent on the presence (discovery) of the lode which is really the basis of the location. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542; Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

8. A patent includes all veins having their tops or apexes within the surface patented. Iron S. M. Co. v. Cheesman, 2 McCrary, 191; 9 Mor. Min. Rep. 552.

9. "The line of location includes the surface ground and the vein or lode, and measures the extent of the miner's right." A location is of surface ground as well as of the vein or lode. McCornick v. Varnes, 2 Utah, 355; 9 Mor. Min. Rep. 505.

10. The surface ground and the lode are not independent grants. It is not the purpose of the act to grant surface ground without a discovered lode. The lode is the principal thing, and the surface ground incident thereto. Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282; Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

11. It is well settled that the rights of the miner to the surface ground of his location are dependent upon his discovery, and upon the relation which the vein in its course and direction bears to the surface as it has been located. The grant of the vein has always been held to be the principal thing, and the surface but an incident, which, as to its extent, is entirely determined by the course of the principal thing granted, to wit, the vein. Colorado Midland Ry. Co. v. Croman, 16 Colo. 381; Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

12. Surface ground is simply an adjunct to the lode and must be coterminous therewith. Engineer Mining & Developing Co., 8 L. D. 381; Plevna Lode, 11 L. D. 236.

13. The end line of a junior claim may not be established within a senior excluded claim beyond the point where the junior lode enters the senior claim. Circular, Dec. 4, 1884, 3 L. D. 540, as amended by Circular of Nov. 7, 1895, 21 L. D. 411.

14. A location of surface ground which does not include any part of the lode claimed to have been discovered therein is invalid. Surface ground is an incident of the lode. Branagan v. Dulaney, 2 L. D. 744.

15. "When one has discovered a vein and has complied fully with the law in locating a claim thereon, the territory inclosed within his surface boundaries is segregated from the public domain in so far as all parties except the government, are concerned. . . . The prospector cannot go within such surface boundaries to prospect for mineral veins, and his act, if he do so, is as much trespass as though the land was patented." Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

16. A vein can only be located by means of a surface claim, and held only to the extent that it is included within the surface lines (except rights to follow it on the dip). Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

17. A formal exclusion from an application for patent of conflict with another claim will not have any effect if it is shown that, as a matter of fact, no such conflict exists. Steamboat Lode, 13 L. D. 168.

18. Although the act of 1872 enlarges the right of a locator by a grant of all veins, lodes and ledges the top or apex of which lie within his surface lines, his rights to surface ground and to other lodes is dependent upon the principal lode, the one forming the basis of the location. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

19. A valid location must be so made that, upon compliance with the law, a patent might be issued, embracing the surface evidences of the location, excepting, perhaps, one or more boundary stakes. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

20. The lode located constitutes the measure of the locator's right to surface ground, and if it terminates at any point within the location or departs from the claim, the location beyond that point is defeasible if not void.

Patterson v. Hitchcock, 8 Colo. 533; 5 Mor. Min. Rep. 542.

21. "Side lines properly drawn would run on each side of the course of the vein or lode distant not more than three hundred feet from the middle of such vein." If they are so drawn as to be intersected by the course of the lode, they are, in fact, end lines, and will be so considered in determining the right of the claimant to follow the lode outside the surface lines of his claim. King v. Amy & Silversmith M. Co., 152 U. S. 222.

22. The law contemplates a location to be made nearly parallel with the line of the vein, and if a locator, knowing the line of the vein, and wilfully and with fraudulent purpose, locate his claim in disregard of such line and course of the vein, and establish its length not along the vein but across it to an excess of several hundred feet or more beyond the three hundred feet limit allowed by Congress, for the fraudulent purpose of gaining and appropriating such excess of surface ground as his mining claim, this would be in deliberate violation of law, and the locator could gain no rights whatever thereby, but his location would be absolutely null and void, and he would be in the same position as if a location had never been attempted to be made. Walsh v. Mueller, 16 Mont. 180.

23. A reservation of the surface of a mining claim in favor of town site property rights declared void. Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858.

24. A claimant under a town site patent which contained the usual exception of mining claims acquired no interest in a valid mining claim or in the surface thereof. Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858.

25. A mineral patent issued after May 10, 1872, could not convey more than three hundred feet of surface on each side of the lode applied for, even though the location was made under a law which allowed more than that width of surface ground. Lakin v. Roberts (Dolly), 7 U. S. App. 539. (On appeal from, 53 Fed. Rep. 333; and 54 Fed. Rep. 461, on review.)

26. The length of a location made under the act of 1866 may be that allowed by said act; but the width of surface ground patented may not exceed three hundred feet on each side of the middle of the vein under section 2320, United States Revised Statutes, act of 1872. Lakin v. Roberts (Dolly), 53 Fed. Rep. 331. (Affirmed on review, 54 Fed. Rep. 461; also 7 U. S. App. 539.)

27. A patent issued subsequent to 1872, of a claim exceeding a width of three hundred feet on each side of the middle of the vein, is void as to excess. Lakin v. Roberts (Dolly), 54 Fed. Rep. 461. (Affirming S. C., 53 Fed. Rep. 331, on review. Affirmed in 7 U. S. App. 539.)

28. The fact that a location embraces surface ground more than allowed by law does not invalidate the location except as to the excess. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607; Richmond M. Co. v. Rose, 114 U. S. 576; Rose v. Richmond Mining Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Atkins v. Hendree, 1 Idaho, 95; 2 Mor. Min. Rep. 328; Burke v. McDonald, 2 Idaho, 646; 33 Pac. Rep. 49; Stemwinder M. Co. v. Emma & Last Chance M. Co., 2 Idaho, 421; 21 Pac. Rep. 1040; Hansen v. Fletcher, 10 Utah, 266; 37 Pac. Rep. 480; Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182. (Questioned in Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. Rep. 714.)

29. Where an extra amount of the lode is claimed by right of discovery, and it is subsequently shown by development that the locators were not the discoverers, the location is void, if at all, only as to the excess. Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7. See 114 U. S. 576.

30. A patent for a lode claim purporting to convey more than three hundred feet on each side of the lode is, to the extent of the excess, void, and to that extent may be attacked collaterally. Lakin v. Dolly (Roberts), 53 Fed. Rep. 333. (Re-affirmed on review in 54 Fed. Rep. 461; also, 7 U. S. App. 539.)

31. The location of a mining claim containing more land than allowed by the laws of the mining district wherein it is situate renders the location invalid only as to the excess, not as to its entirety. Richmond M. Co. v. Rose, 114 U. S. 576.

32. The prior locator need not adverse to secure his rights to his vein at the point of intersection; but by failure to adverse he loses surface rights. When two veins join

on the strike there must be surface conflict. Hence rules as to surface conflicts apply as to conflicts between lodes. Lee v. Stahl, 13 Colo. 174; 22 Pac. Rep. 436. (Affirming S. C., 9 Colo. 408; 11 Pac. Rep. 77.) Morgenson v. Middlesex M. & M. Co., 11 Colo. 176; 17 Pac. Rep. 518.

33. The Land Department cannot except any part of the surface ground from the patent of a mining claim based on a prior location. If it does, its act to that extent is void, and it may be so declared in an action at law. Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574.

34. Under no law is the locator of a lode authorized to follow the same on its strike outside the lines of his location on the surface. McCornick v. Varnes, 2 Utah, 355; 9 Mor. Min. Rep. 505.

35. In the absence of a showing to the contrary it is presumed that the patentee of a claim has the right to any lode inside of his surface lines. Iron Silver M. Co. v. Campbell, 17 Colo. 267; 29 Pac. Rep. 518. See 135 U. S. 286.

36. The applicant for patent cannot waive an adverse claim by excluding from his application the area covered by the adverse claim, and so vest the Land Department with jurisdiction to patent the remaining portion of his claim. The adverse claim can be waived only by one setting it up. But if the Land Department does so proceed there is no cause of complaint by the adverse claimant, and it is only a question between the Land Department and the applicant for patent. Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683. (Reversing 7 U. S. App. 463; 54 Fed. Rep. 284; 9 U. S. App. 613; 61 Fed. Rep. 557.)

37. After issuance of a placer patent the owner of a lode therein, located with surface ground twenty-five feet in width on each side, may not so amend his location as to take in a greater amount of surface ground. Becker v. Sears, 1 L. D. 577.

38. A judicial award of the right of possession to an adverse placer claimant as against the applicant for patent for a lode claim does not preclude inquiry by the Land Department on an allegation by the lode claimant that the placer claim, as subsequently applied for, embraces a known lode, where it appears that the question was not tried on the adverse suit; and if such allegation is sustained the lode claimant may make entry of his lode together with surface ground necessary to the convenient working thereof. Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 L. D. 95.

39. The limitation of the width of a lode claim within a placer, prescribed by section 2333, United States Revised Statutes, has no application to a case where a lode was covered by a valid location of the full legal extent prior to the application for placer patent, but the whole lode claim is excepted from the placer patent. Pike's Peak Lode, 10 L. D. 200. See South Star Lode, 20 L. D. 204.

40. The locator of a lode claim, who fails to adverse an application for a placer claim covering the same, by such failure loses his rights to surface ground in excess of twenty-five feet on each side of the middle of his lode. Shonbar Lode, 3 L. D. 388. (Modified in South Star Lode, 20 L. D. 204.) See Pike's Peak Lode, 10 L. D. 200.

41. Section 2333, United States Revised Statutes, carves out of a placer patent all lodes known to exist within the placer at date of application therefor, with twenty-five feet of surface ground on each side. Becker v. Sears, 1 L. D. 577.

42. Where it appears to the satisfaction of the Land Department that a lode was known at date of application for placer patent, the lode, with surface ground twenty-five feet on each side, may be patented, notwithstanding the issuance of the placer patent. Shonbar Lode, 1 L. D. 551; 3 L. D. 388. See Pike's Peak Lode, 10 L. D. 200; and South Star Lode, 20 L. D. 204.

43. An individual owner of a placer claim may not, by making a relocation or amended or additional location, increase the area of his claim more than twenty acres, and, if the additional area taken exceeds twenty acres, the additional location is void as to the excess. Joseph M. Knapp, 2 L. D. 768.

44. Where application for a placer patent was made and no adverse filed by a lode claimant, and subsequently the lode claimant applied for patent and was adversed by the placer applicant, who began suit and then dismissed it, it was held that the placer applicant had abandoned the conflict and that patent for the lode claim need not be confined to twenty-five feet on each side of the

middle of the lode. Monroe Lode, 4 L. D. 273.

45. A placer patent carries title to the surface ground as well as to the land beneath the surface. Deffeback v. Hawke, 115 U. S. 392.

46. A tunnel location five thousand feet long is not void because it covers more than three thousand feet in length, but would be good to the extent of three thousand feet at least. Glacier Mtn. S. M. Co. v. Willis, 127 U. S. 471.

47. Where a mining claim is located upon an Indian reservation and the locator is in possession at the date the reservation is thrown open, "with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, he could, by adopting what had been done, causing a proper record to be made, and performing the amount of labor or making the improvement necessary to hold the claim, date his rights from that day; and that such location and labor and improvements would give him the right of possession." Noonan v. Caledonia G. M. Co., 121 U. S. 393; 8 Dak. 189; 14 N. W. Rep. 426.

48. Entry should not be allowed when it is shown that the lode is not embraced within claimed ground, as the right to surface ground depends on the possession of a lode therein. Branagan v. Dulaney, 2 L. D. 744.

49. A judgment rendered on an adverse suit, awarding the surface of the ground involved to a placer claimant, and lodes therein contained to lode claimants, is without authority of law, and will not be followed by the Land Department, which will not issue a patent for a placer claim containing known lodes belonging to one other than the placer claimant. Apple Blossom Placer v. Cora Lee Lode, 14 L. D. 641.

50. "A location since the 10th day of May, 1872, based on a discovery made within the limits of a claim properly located, and not abandoned or lost by failure to perform the labor thereon required by law, is an invalid location; for by the provisions of section 2322, the locator of such claim has the exclusive right of possession and enjoyment of all the surface included within the lines of the location, 'and of all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines.' If the locator then has the exclusive right of the possession and enjoyment, how can a prospector go on such claim and make a valid discovery?" Branagan v. Dulaney, 2 L. D. 744.

51. The United States Surveyor General may not require a claimant to exclude land from the claim surveyed. Antediluvian Lode & Mill Site, 8 L. D. 602.

52. "A mining claim is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with the mining laws, local and statutory. It must, under the law of Congress of 1872 (sec. 2320, U. S. Rev. Stat.), be located upon at least one known vein or lode, but the vein or lode is not the whole claim." "A mining claim is not merely a vein or lode, but that with a certain quantity of surface ground." Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

53. Surface ground is not given a locator simply for the working of the particular lode located, but to give him all other veins the apexes of which are found in the location. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

54. An adverse claim which alleges no surface conflict of claims will not be received as such, as the relative rights of the parties to work a lode on its dip must be determined by the courts. New York Hill Co. v. Rocky Bar Co., 6 L. D. 318.

55. The location of a mining claim must be recorded before a survey thereof may be made. Com'r to Surveyor General of Nevada, 1 L. D. 581.

56. A miner has no right to surface ground in following his lode on the dip. Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 3; 11 Pac. Rep. 515.

57. When the lode line is defined, if the number of feet of surface ground on each side thereof is known, the location is sufficiently marked, as its boundaries can be readily ascertained. Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

58. A lode mining claim may not exceed fifteen hundred feet in length by six hundred feet in width. No markings of the location outside of those limits are to be considered, as no one is required to look beyond such

limits for location monuments. Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. Rep. 714; Leggatt v. Stewart, 5 Mont. 107; 2 Pac. Rep. 320; 15 Mor. Min. Rep. 358.

59. The width of a lode claim may be restricted to twenty-five feet on each side of the middle of the lode by local statute, regulation or custom. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

60. The Montana statute of 1864, allowing surface ground fifty feet on each side of the lode, construed as meaning fifty feet on each side the inclosing walls of the lode, allowing the width of the claim to be one hundred feet plus the width of the lode. Foote v. National M. Co., 2 Mont. 402; 9 Mor. Min. Rep. 605.

61. A patent to a mining claim passes whatever title the government had to the surface and all veins beneath the surface not otherwise granted, and its issue presumes a compliance with the mining laws. Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645.

62. "Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode." Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

63. After discovery the discoverer has a reasonable time within which to trace his lode and mark the surface lines of his claim. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

64. The common-law doctrine that he who possesses the surface owns to the center of the earth is greatly modified by the mineral land laws, under which one person may own the surface and another own a vein running thereunder. Bullion M. Co. v. Croesus G. & S. M. Co., 2 Nev. 168; 5 Mor. Min. Rep. 254.

65. The owner of a valid location is entitled to its exclusive use and possession, and a stranger who enters thereon for the purpose of mining, cutting timber, or otherwise interfering with the owner's use or possession, is a trespasser. Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240. See, also, Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

66. In an ejectment suit where plaintiff shows title by patent for a mining claim, and defendant admits possession for town site purposes, plaintiff is entitled to judgment without showing that the surface is necessary to the working of his mine. Abbott v. Primeaux, 16 Nev. 361.

67. The form of a lode mining location need not necessarily be that of a parallelogram. The formation of the mineral deposit must govern. Breece M. Co., 3 L. D. 11.

68. No survey of a lode discovered in a tunnel will be made until the exact surface ground is ascertained. William L. Campbell, 4 C. L. O. 102.

69. The development and possession of a lode is not interfered with by the waiver of a portion of the surface ground. Gustavus Hagland, 1 L. D. 593.

70. No patent can issue for a vein or lode without surface ground. William L. Campbell, 4 C. L. O. 102.

71. Surface ground cannot be claimed on account of a lode owned by other parties. Cons. Bobtail G. M. Co., 9 C. L. O. 113.

72. Where surface ground is not in conflict, a separate location undeveloped is not an adverse mining claim. Jacques v. Robinson, 7 C. L. O. 50.

73. A patent will be issued in which a reservation will be inserted, reciting the fact that the surface ground described is the estimated area of the lode, where there was no provision for the location of surface ground. 420 M. Co. v. Bullion M. Co., 2 C. L. O. 5.

2. *Apex, Dip.*

74. The apex of a vein is that end which approaches nearest the surface, but is not the highest part of a roll or swell of mineral matter. Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557. See Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Rep. 304.

75. The apex of a lode is the end, edge, or terminal point nearest the surface of the earth. Iron Mine v. Loella Mine, 2 McCrary, 121; 1 Colo. Law Rep. 16; 3 Fed. Rep. 868.

(Also reported as Iron Silver M. Co. v. Murphy, 1 Mor. Min. Rep. 548.)

76. A vein need not necessarily crop out on the surface in order that a location may be properly laid upon it; but where the vein does crop out along the surface or is slightly covered by foreign matter so that the course of the apex can be readily ascertained, this course should be substantially followed in laying claims and locations upon it. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

77. A locator has all lodes the apexes of which are inside his location to which no right had attached at the date of his location, but does not own any veins the apexes of which are outside of his claim. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

78. The owner of a mining claim is to be regarded as the owner of all within his claim until some other person shows, by a preponderance of evidence, clear title to the apex of a lode dipping into the claim. Leadville M. Co. v. Fitzgerald, 4 Mor. Min. Rep. 380.

79. Section 2322, United States Revised Statutes, gives to the owner of the apex of a vein or lode not only all that is covered by the surface lines of his claim as those lines are extended vertically, but it gives him the right to possess and enjoy the lode or vein by following it on the dip when it passes outside of these vertical lines laterally. Iron Silver M. Co. v. Cheesman, 116 U. S. 529. See 1 McCrary, 191; 9 Mor. Min. Rep. 552; Iron Mine v. Loella Mine, 2 McCrary, 121; 3 Fed. Rep. 368; 1 Colo. Law Rep. 16. (Also reported as Iron Silver M. Co. v. Murphy, 1 Mor. Min. Rep. 548.)

80. The locator who has a vein extending through his claim owns all other veins whose apexes are within his claim, and may adverse an application for a conflicting claim located on one of such other veins. Freeland v. Hoffman, 13 Mor. Min. Rep. 289.

81. A miner has no right to follow a lode on its dip into the claim of another, unless he has the apex of the lode in his own claim. Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662; 23 Pac. Rep. 547.

82. Where a vein outcrops in two mining claims, the first locator has the better right. Argentine M. Co. v. Terrible M. Co., 122 U. S. 478. See 5 McCrary, 639.

83. Unauthorized underground working of a lode will not prevent its location by the discoverer of the apex, as "The possession of a vein, recognized by the mining laws and to which protection is given, is by one who holds the surface where the vein makes its apex." Eilers v. Boatman, 3 Utah, 159; 1 West Coast Rep. 632; 2 Pac. Rep. 66; 15 Mor. Min. Rep. 462. (On appeal, 111 U. S. 356; 15 Mor. Min. Rep. 471.)

84. When a vein or lode located on the apex passes on the dip outside the plane of the side lines extended vertically, and encroaches on another's vein, it must be shown that the vein passing outside the side lines is a continuation of the vein located, in order to give the right to pursue it. Iron Silver M. Co. v. Cheesman, 116 U. S. 529. (See 2 McCrary, 191; 9 Mor. Min. Rep. 552.) Iron Mine v. Loella Mine, 2 McCrary, 121; 3 Fed. Rep. 368; 1 Colo. Law Rep. 16. (Also reported as Iron Silver M. Co. v. Murphy, 1 Mor. Min. Rep. 548.)

85. The top or apex of a vein must be found within the limits of a claim located to form the basis of a valid location; but such apex is not necessarily a point, but may be a line of great length, and if a portion of it is discovered within the claim, that is sufficient upon which to base a valid location. Larkin v. Upton, 144 U. S. 19. (Affirming 5 Mont. 600; 6 Pac. Rep. 66; 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404.)

86. In an action to quiet title to a vein or lode it is sufficient to describe such lode by its name if the lot or mining claim in which it has its apex is specifically described in the complaint. Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 3; 11 Pac. Rep. 515.

87. The lode or vein "which may thus be possessed and enjoyed outside of the limits of the surface side lines extended vertically must be the same vein or lode on the apex or outcrop of which the claim of the party has been located." Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

88. The owner of a mining claim is *prima facie* owner of all minerals inside his surface lines; but if evidence is introduced going to show that the vein in controversy has its apex outside of the claim, he must prove his right to it by proving its apex to be inside. Jones v. Prospect Mtn. T. Co., 21 Nev. 339; 31

Pac. Rep. 642; Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. Rep. 540. (Refusing to follow Bell v. Skillicorn, 28 Pac. Rep. 768.)

89. "The ownership of or title to a vein is determined by its top or apex; and although one may discover a vein within the limits of the ground claimed, yet if the top or apex of such vein lies without his claim, he will acquire no right thereto." Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66. See, also, 114 U. S. 19.

90. Claimant under the act of 1866 need not adverse an application for another lode, though the apex of his lode is covered by the claim applied for, by reason of the fact that the act of May 10, 1872, protects adverse rights existing prior to that date. Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304.

91. The issuance of a lode patent is conclusive proof that the claim is located on the apex of a vein. Iron Silver M. Co. v. Campbell, 17 Colo. 267; 29 Pac. Rep. 518. See, also, 135 U. S. 286.

92. The first locator having the apex of the vein entirely within the surface lines of his claim for a portion of its length, and for the remaining portion partly within and partly without and within the surface lines of another claim, but never entirely departing from such first location, owns the entire lode within the end lines of his claim. Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 3; 11 Pac. Rep. 515.

93. When the owner of a lode claim sells a part of his location, section 2336, United States Revised Statutes, does not apply in deciding respective rights of grantor and grantee, but the grantee takes, absolutely, *all* of every vein the apex of which is in the granted premises, as against the grantor, though they may be intersected on the dip by a prior located vein of the grantor. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98. See S. C., 96 Cal. 33; 30 Pac. Rep. 839.

94. Work done upon the claim, even though upon a lode the apex of which is outside the claim, will prevent forfeiture. Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

95. Ordinarily the dip of a lode is practically at right angles to the strike. Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662; 23 Pac. Rep. 547.

96. The act of 1872 gives the locator exclusive right to the surface of his claim, and "not only the particular lode or vein located, but to all other veins of his location, with the right to follow such veins, lodes or ledges to any depth." Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 9 Mor. Min. Rep. 578.

97. Under the law prior to 1872, the locator was entitled to but one vein. After the act of 1872 he was entitled to all veins having their tops or apexes within his surface lines. One who was the owner of a vein prior to May 10, 1872, and who was in possession thereof at that date, has the right to follow his vein within the patented surface ground of another on its dip. Blake v. Butte S. M. Co., 2 Utah, 54; 9 Mor. Min. Rep. 503.

98. Extra-lateral rights to work a lode other than the one specifically located are governed by the end lines as located in the same manner as the extra-lateral rights to work the lode located. Walrath v. Champion M. Co., 63 Fed. Rep. 552.

99. "Under the act of 1866 (14 Stat. 251), parallelism in the end lines of a surface location was not required, but where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines. His lateral right by statute is confined to such portion of the vein as lies between such planes drawn through the end lines and extended in their own direction, that is, between parallel vertical planes. It can embrace no other portion." Iron Silver M. Co. v. Elgin M. & Sm. Co. (Horseshoe Case), 118 U. S. 196.

100. Non-parallelism of the end lines will not defeat the right of the locator on the apex of a lode to follow the lode on its dip, if the end lines converge in the direction of the dip, as the non-parallelism in that case would restrict the rights of the claimant. Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597.

101. The locator may follow his lode on its dip, but cannot go beyond or outside of the side lines on the course or strike of the vein. McCornick v. Varnes, 2 Utah, 355; 9 Mor. Min. Rep. 505.

102. Each locator is entitled to follow the dip of his lode or vein to an indefinite depth, though it carries him outside of the side lines

of the location; but this right is based on the hypothesis that the side lines substantially correspond with the course of the lode or vein at the surface; and it is bounded at each end by the end lines of the location crossing the lode or vein, and extended perpendicularly downwards and indefinitely in their own direction. Flagstaff S. Mining Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478.

103. Where a location was made under the act of 1866, and had not parallel end lines, for the purpose of bounding the rights to follow the lode on its dip, end lines will be drawn parallel at each end, at right angles with the general course of the vein. Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 9 Mor. Min. Rep. 578.

104. A location properly made gives the locator the right to the vein upon which the location is based, and to all other veins having their apexes in the location, with the right to follow the same on the dip between perpendicular planes passed through parallel end lines. Iron S. M. Co. v. Cheesman, 2 McCrary, 191; 9 Mor. Min. Rep. 552.

105. The right to follow a lode on its dip is not affected by the fact that, as originally located, the end lines of the claim were not parallel, where one was subsequently so drawn in as to render them parallel. Doe v. Sanger, 83 Cal. 203; 23 Pac. Rep. 365.

106. A location of a lode claim in the form of a triangle, *i. e.*, having only one end line, gives the locator no right to follow his lode outside of the surface lines of his location. Montana Co. v. Clark, 42 Fed. Rep. 626.

107. The identity of the vein outside of the side lines with that inside the lines is essential to the possession and pursuit thereof outside such lines. So long as the inclosing walls can be distinctly and continuously traced and the mineral matter of the same character found between them, there can be no doubt that it is the same vein; but if the mineral disappears, or the fissure with its walls of the same rock disappears, the identity can no longer be traced; then the right to follow the vein outside the perpendicular lines of the survey is lost. Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

108. When a vein runs across instead of along the claim, the side lines become, in law, the end lines for the purpose of determining the right to follow the lode on its dip. Argentine M. Co. v. Terrible M. Co., 122 U. S. 478; Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683.

109. The question as to relative rights of claimants to follow a lode on the dip is one of priority of location under section 2336, United States Revised Statutes. Tyler M. Co. v. Sweeney, 4 U. S. App. 329; 54 Fed. Rep. 284.

110. The owner of a vein or lode may follow it outside of the perpendicular extension of the side lines of the claim, but not outside of its end lines. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

111. Where the end lines of a lode claim are not drawn so as to secure all rights possible under the law, the locator must bear the consequences. The court cannot relocate the claim, making new lines therefor. The most that it can do where the lines are drawn inaccurately and irregularly is to give the claimant such rights as his imperfect location warrants, under the law. King v. Amy & Silversmith M. Co., 152 U. S. 22. (Reversing 9 Mont. 543; 24 Pac. Rep. 200.)

112. In order to entitle a locator to follow the lode on its dip into the claim of another, the continuity of a body of ore from the apex which has been located to the point in controversy must be shown. Iron Mine v. Loella Mine, 2 McCrary, 121; 3 Fed. Rep. 368; 1 Colo. Law Rep. 16. (Also reported as Iron Silver M. Co. v. Murphy, 1 Mor. Min. Rep. 548.) Hyman v. Wheeler, 29 Fed. Rep. 347.

113. One claiming the right to follow a lode outside of his claim must show the same to be a continuous streak of quartz, ore or vein matter, not merely an indication such as a miner would follow with the expectation of finding ore. Fitzgerald v. Clark, 157 U. S. 696. See, also, 42 Pac. Rep. 278.

114. A patentee has *prima facie* right to all minerals inside the lines of his claim, and the burden is on one following a lode on its dip into the claim to show that he has a valid location on the apex of the lode. Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; 15 Mor. Min. Rep. 641; Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Cheesman v. Shreeve, 37 Fed. Rep. 36; Cheesman v. Shreeve, 40 Fed. Rep. 787; Cheesman v. Hart, 42 Fed.

Rep. 98; Doe v. Waterloo M. Co., 54 Fed. Rep. 935; Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. Rep. 540; Driscoll v. Dunwoody, 16 Pac. Rep. 726; Bell v. Skillicorn, 28 Pac. Rep. 768; Iron Silver M. Co. v. Campbell, 17 Colo. 267; 29 Pac. Rep. 513. (See 135 U. S. 286.) Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662; 23 Pac. Rep. 547; Duggan v. Davey, 26 N. W. Rep. 887; Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Rep. 804; Leadville M. Co. v. Fitzgerald, 4 Mor. Min. Rep. 380. *Contra*, Montana Co. v. Clark, 42 Fed. Rep. 626.

115. A prior locator on the dip of a lode has the right to the lode inside his claim as against a subsequent locator of the apex of the lode. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

116. A locator on the dip of a lode may not follow it beyond the lines of his claim. Iron Mine v. Loella Mine, 2 McCrary, 121; 3 Fed. Rep. 368; 1 Colo. Law Rep. 16. (Also reported as Iron S. M. Co. v. Murphy, 1 Mor. Min. Rep. 548.) Duggan v. Davey, 26 N. W. Rep. 887.

117. A locator on the dip of a lode has no right as against a locator on the apex, the date of the respective patents being immaterial. Colorado Central Cons. M. Co. v. Turck, 4 U. S. App. 290; 12 U. S. App. 85; 50 Fed. Rep. 888; Pardee v. Murray, 14 Mont. 284; 2 Pac. Rep. 16; 15 Mor. Min. Rep. 515.

118. Under section 2322, United States Revised Statutes, the locator of a mining claim on the apex of a lode may follow the lode on its dip, even though it dips into a claim held under a senior patent. Colorado Central Cons. M. Co. v. Turck, 4 U. S. App. 290; 12 U. S. App. 85; 50 Fed. Rep. 888.

119. No rights can be acquired by adverse possession under the statute of limitations by sinking on the dip of a vein without the knowledge of the owner of the apex. Pardee v. Murray, 4 Mont. 284; 2 Pac. Rep. 16; 15 Mor. Min. Rep. 515.

120. If the apex of a vein has been duly located, one who sinks a discovery shaft on the dip can acquire no rights as against the locator of the apex. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

121. One following a vein on its dip into the claim of another need only show the apex to be outside of such claim to defeat a suit by the owner of the claim. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

122. Where a vein crosses the side line of a location, the strike is terminated by the plane of such side line, and the right to follow the vein on its dip is determined by a vertical plane parallel to the end lines, drawn downward, and which takes effect at the point where the apex intersects the side line. King v. Amy & Silversmith Cons. M. Co., 9 Mont. 543; 24 Pac. Rep. 200. (Reversed, 152 U. S. 222.)

123. When a vein or lode located on the apex passes on the dip outside the plane of the side lines extended vertically and encroaches on another's vein, it must be shown that the vein passing outside the side lines is a continuation of the vein located, in order to give the right to pursue it. Iron Silver M. Co. v. Cheesman, 116 U. S. 529. See 2 McCrary, 191; 9 Mor. Min. Rep. 552.

124. A gravel deposit or stratum, even between well defined walls and having an incline or dip, is not a lode. Gregory v. Pershbaker, 73 Cal. 109; 14 Pac. Rep. 401; 15 Mor. Min. Rep. 602.

125. A miner has no right to surface ground in following his lode on the dip. Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 3; 11 Pac. Rep. 515.

126. An adverse claim which alleges no surface conflict of claims will not be received as such, as the relative rights of the parties to work a lode on its dip must be determined by the courts. New York Hill Co. v. Rocky Bar Co., 6 L. D. 318.

127. Where an adverse claim is compromised by allowing the applicant to secure patent, and title to both claims becomes vested in one person, he must, as to his right to follow on their dip the lodes found in the conflict, depend upon title to the patented claim. Del Monte M. & M. Co. v. New York & Last Chance M. Co., 66 Fed. Rep. 212. (Follows Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607, in the principle that the locator must establish his end line where the lode departs from the assumed course and intersects the side line.)

128. The locator of a lode has absolutely no right to work another lode which dips under his claim, without regard to whether or not the right to work it belongs to any

other person. Montana Co. v. Clark, 42 Fed. Rep. 626.

129. Extra-lateral rights of a patentee depend on the actual course and position of the vein, not on the course and position indicated on the patent survey. Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. Rep. 540.

130. A lode claimant has no right to follow his lode on its dip under an agricultural claim which was entered prior to the location of the mining claim. Colorado Central Cons. M. Co. v. Turck, 4 U. S. App. 290; 12 U. S. App. 85; 50 Fed. Rep. 888; Amador-Medean G. M. Co. v. South Spring Hill G. M. Co., 13 Sawy. 523; 36 Fed. Rep. 668; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348.

131. In a controversy as to ownership of a vein on its dip, the issuance of patent does not prove the correctness of the Land Department record as to date of location, but this must be proven as any other matter would be. Last Chance M. Co. v. Tyler M. Co., 9 U. S. App. 613; 61 Fed. Rep. 557; Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78; 16 Pac. Rep. 513; Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645.

132. In an action of ejectment, plaintiff (senior locator) alleged a union of veins on the dip, and claimed all below point of union; while defendant alleged that the veins crossed each other on the dip. *Held*, that if a general verdict is given for defendant, plaintiff has lost his right to the vein at the point of intersection by failing to ask proper instructions to protect his right thereto. Little Josephine M. Co. v. Fullerton, 19 U. S. App. 190; 58 Fed. Rep. 521.

133. Under section 2336 of the United States Revised Statutes, where veins unite on the dip, the oldest or prior location is entitled to the vein below the point of union. Champion M. Co. v. Cons. Wyoming G. M. Co., 75 Cal. 78; 15 Pac. Rep. 513.

134. The union of veins referred to in section 2336, United States Revised Statutes, refers to union on the dip, not on the strike. Lee v. Stahl, 13 Colo. 174; 22 Pac. Rep. 436. (Affirming 9 Colo. 208; 11 Pac. Rep. 77.) Morgenson v. Middlesex M. & M. Co., 11 Colo. 176; 17 Pac. Rep. 513.

135. Where two veins, each located and owned by the same person, unite on the dip, the lode below the point of union goes with the title to the senior location, and if below that point it unites with still another lode, the point to decide would be, which was first, the senior location of the first party or the location of such other lode. Little Josephine M. Co. v. Fullerton, 19 U. S. App. 190; 58 Fed. Rep. 521.

136. In case of failure to adverse, only cross-veins and those uniting on the dip with the one patented are excepted from the patent. Lee v. Stahl, 13 Colo. 174; 22 Pac. Rep. 436. (Affirming 9 Colo. 208; 11 Pac. Rep. 77.)

137. The fact that a lode has a very slight departure from the horizontal will not except it from the operation of the statute giving the locator of the apex the right to follow it on the dip. Leadville M. Co. v. Fitzgerald, 4 Mor. Min. Rep. 380 (Colo.).

138. The fact that a lode is nearly horizontal (a blanket lode) does not defeat the right of a locator of the apex to follow it outside his claim on the dip, even though the dip be slight. Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557. See Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Rep. 304.

139. A locator working subterraneously into the dip of a vein belonging to another locator, who is in possession of his location, is a trespasser, and liable to an action for ore taken therefrom. Flagstaff S. Mining Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

140. Though a United States patent grants the right to follow on its dip the patented lode, such right may be restricted, as between parties, by a contract made before patent. Richmond M. Co. v. Eureka M. Co., 103 U. S. 839; 9 Mor. Min. Rep. 634. (Former trials, S. C., 8 Mor. Min. Rep. 144; 9 Mor. Min. Rep. 578.)

TUNNELS.

I. The Statutes.
II. Regulations.
III. Decisions.

I. The Statutes.

Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tun-

nel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel. 17 Stat. 92; 19 Stat. 52; sec. 2323, U. S. Rev. Stat.

SUTRO TUNNEL ACTS.

July 25, 1866, 14 Stat. 244. Summary.

The first section of the above act granted to A. Sutro, his heirs and assigns, the right of way to run, construct, and excavate a mining, drainage, and exploring tunnel to and beyond the "Comstock lode," etc. This tunnel has been known as the "Sutro Tunnel."

The second section granted said Sutro, his heirs and assigns, the right to purchase, at $1.25 per acre, unappropriated non-mineral land, not to exceed two sections, near the mouth of the tunnel, for the use of the same; and also granted the right to purchase at $5 per acre mineral veins or lodes within two thousand feet on each side of said tunnel, subject to the act, and also to any subsequent legislation that Congress might provide, and furthermore excepting from the grant the Comstock lode with all its dips, spurs, and angles, and also all other lodes within said two thousand feet which at the passage of the act had been located, or which were in the actual *bona fide* possession of other persons.

Said section also provided that the lodes excepted, other than the Comstock lode, should be withheld from sale, and that should such lodes be abandoned or not worked, possessed or held in conformity to existing mining rules, or such regulations as have been or may be prescribed by the legislature of Nevada, they would then become subject to the right of purchase by the grantee, Sutro, his heirs or assigns.

Section 3 provided for the contribution to the tunnel owners by the owners of the above mentioned mines, drained, benefited or developed by said tunnel, of the same rate of charges for drainage or other benefits derived from said tunnel as have been, or may thereafter be, named in an agreement between the tunnel owners and the companies representing a majority of the estimated value of the said Comstock lode at the time of the passage of the act.

"Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled 'An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada,' approved July twenty-five, eighteen hundred and sixty-six." 16 Stat. 218; 17 Stat. 96; 19 Stat. 52; sec. 2344, U. S. Rev. Stat.

II. Regulations.

20. Section 2323 provides that where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins or lodes on the line of said tunnel.

21. The effect of this is simply to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the *line thereof* and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist.

22. The term "face," as used in said section, is construed and held to mean the first working-face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted, upon which prospecting is prohibited as aforesaid.

23. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel-right; the actual or proposed course or direction of the tunnel; the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the *locus* in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to the

specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

24. At the time of posting notice and marking out the lines of the tunnel as aforesaid, a full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

25. By a compliance with the foregoing much needless difficulty will be avoided, and the way for the adjustment of legal rights acquired in virtue of said section 2323 will be made much more easy and certain.

26. This office will take particular care that no improper advantage is taken of this provision of law by parties making or professing to make tunnel locations, ostensibly for the purposes named in the statute, but really for the purpose of monopolizing the lands lying in front of their tunnels to the detriment of the mining interests and to the exclusion of *bona fide* prospectors or miners, but will hold such tunnel claimants to a strict compliance with the terms of the statutes; and a *reasonable diligence* on their part in prosecuting the work is one of the essential conditions of their implied contract. Negligence or want of due diligence will be construed as working a forfeiture of their right to all undiscovered veins on the line of such tunnel.

III. Decisions.

1. Before a tunnel claimant under section 2323, United States Revised Statutes, acquires any right to a lode, it must be discovered in the tunnel. Corning Tunnel & M. Co. v. Pell, 4 Colo. 507; 14 Mor. Min. Rep. 612.

2. The "line of tunnel" under section 2323, United States Revised Statutes, is the strip of land between the projected side lines of the tunnel. Hope M. Co. v. Brown, 7 Mont. 550; 19 Pac. Rep. 218. (Overruled in 11 Mont. 370; 28 Pac. Rep. 732.)

3. The "line of tunnel," as used in section 2323, United States Revised Statutes, means the space between the lines of the sides of the tunnel, protracted, not the entire width of the tunnel location. Corning Tunnel & M. Co. v. Pell, 4 Colo. 507; 14 Mor. Min. Rep. 612.

4. Prospecting within the lines of a tunnel claim for lodes not previously known to exist is prohibited while work on the tunnel is prosecuted. David Hunter, 5 C. L. O. 130.

5. Section 2323, United States Revised Statutes, does not authorize the location as a tunnel claim of a tract of land fifteen hundred feet by three thousand feet. Corning Tunnel & M. Co. v. Pell, 4 Colo. 507; 14 Mor. Min. Rep. 612.

6. A tunnel site cannot exceed three thousand feet in length with width of the actual width of the tunnel. Com'r to John Hunter, 5 C. L. O. 84.

7. Notice and location of a tunnel claim are required only where blind lodes are sought. Henry M. Hoyt, 8 C. L. O. 70.

8. When in running the tunnel a lode is struck, the same proceedings are required as in cases of discovery from the surface relative to the location of the discovered lode. David Hunter, 5 C. L. O. 130; Rico-Aspen Cons. M. Co. v. Enterprise M. Co., 53 Fed. Rep. 321; Hope M. Co. v. Brown, 7 Mont. 550; 19 Pac. Rep. 218. (Overruled in 11 Mont. 370; 28 Pac. Rep. 732.)

9. Location on the surface, based on a tunnel discovery, will relate back to the location of the tunnel claim, and cut out an intervening surface location of the same lode. Rico-Aspen Cons. M. Co. v. Enterprise M. Co., 53 Fed. Rep. 321.

10. A lode discovered in a tunnel run in accordance with the provisions of section 2323, United States Revised Statutes, and of which a location notice was posted at the mouth of the tunnel, and duly recorded, need not be located by the discoverer on the surface to protect his rights, and a subsequent locator on the surface acquires no rights. Ellet v. Campbell, 18 Colo. 510; 33 Pac. Rep. 521.

11. All locations made within a tunnel claim, subsequent to its location, are subject to the inchoate rights of the tunnel claimant. Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. Rep. 200.

12. Patent will not issue for a claim on the projected line of a tunnel held under section 2323, United States Revised Statutes, but patent proceedings will be suspended to await further development in the tunnel or abandon-

ment of the tunnel claim. Back v. Sierra Nevada Cons. M. Co., 2 Idaho, 386; 17 Pac. Rep. 83.

13. A tunnel claimant need not adverse a lode applicant whose claim lies within fifteen hundred feet of the line of the tunnel where there is no apparent conflict of rights, and is not estopped by failure so to adverse from claiming fifteen hundred feet along any lodes subsequently discovered in his tunnel. Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. Rep. 200. (Refusing to follow Corning Tunnel & M. Co. v. Pell, 4 Colo. 507; 14 Mor. Min. Rep. 612.)

14. A tunnel claimant has no cause for adversing the application of a lode claimant who has made a discovery outside of the line of the tunnel, and whose location lies across the line of tunnel, unless the lode has been discovered in the tunnel. Hope M. Co. v. Brown, 7 Mont. 550; 19 Pac. Rep. 218. This decision was overruled in the same case (11 Mont. 370; 28 Pac. Rep. 732), wherein it was held that patent proceedings by the lode claimant will be suspended until development of the lode in the tunnel or abandonment of the tunnel right, and (*semble*) the lode claimant may be restrained from taking ore from the line of the tunnel in the meantime. (Refusing to follow Corning Tunnel & M. Co. v. Pell, 4 Colo. 509; 14 Mor. Min. Rep. 612.)

15. A tunnel claim should be protected by an adverse, being a mining claim. Back v. Sierra Nevada Con. M. Co., 2 Idaho, 386; 17 Pac. Rep. 83; Bodie Tunnel & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584. See Tioga Cons. M. Co., 8 C. L. O. 88.

16. Parties forfeit all right to undiscovered veins on the line of their tunnel by a failure to prosecute work on their tunnel for six months. Com'r to John Hunter, 5 C. L. O. 34.

17. Where "the complaint alleges that a valid and legal location of a tunnel (claim) was made by persons under whom the plaintiff claims, and the plaintiff held possession of the same for more than five consecutive years prior to the ouster by the defendants, and paid all the taxes during that period legally or otherwise assessed upon said property," the plaintiff, under the Colorado laws, would have the right to the premises in dispute, superior to any other claim except that of the government. Glacier Mountain S. M. Co. v. Willis, 127 U. S. 471.

18. On the discovery of a lode in the tunnel within three thousand feet of the face thereof, the tunnel claimant may locate fifteen hundred feet of such lode, subject only to the requirement that his discovery must be covered by his claim. Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. Rep. 200.

19. A miner has no right to run a tunnel through a non-mineral portion of a town lot to work a lode that was known to exist at the date of town site entry, though he may have the right to work the mine. Dower v. Richards, 73 Cal. 477; 15 Pac. Rep. 105.

20. A statute (Colorado) limiting the length of locations on tunnel discoveries to two hundred and fifty feet on each side of the tunnel is not in conflict with United States laws. Rico-Aspen Cons. M. Co. v. Enterprise M. Co., 53 Fed. Rep. 321.

21. A tunnel location five thousand feet long is not void because it covers more than three thousand feet in length, but would be good to the extent of three thousand feet at least. Glacier Mtn. S. M. Co. v. Willis, 127 U. S. 471.

22. The timber on a tunnel site belongs to the tunnel owner. Com'r to John Hunter, 5 C. L. O. 34.

23. The act of February 11, 1875, credits to a lode claim the expenditures made in running a tunnel for the purpose of developing the lode owned by the proprietors of the tunnel. George S. Dodge, 6 C. L. O. 122.

24. The expenditures may be made from the surface or in running a tunnel for developing a lode. Com'r to E. D. Coleman, May 27, 1874, 1 C. L. O. 34.

25. A tunnel on one of several claims cannot be counted as work for the benefit of the group if, in fact, it does not so tend. McCormick v. Baldwin, 104 Cal. 227; 37 Pac. Rep. 903.

26. An expenditure of more than $1,500 by the owners of an adjoining mine on the portion of a tunnel running through the premises embraced in an application for patent is an expenditure under the mining law upon the claim applied for. George K. Willard, 4 C. L. O. 67.

27. Money expended in running tunnels to develop one or more lodes is considered as money spent on those lodes. Com'r to William S. Merrell, Dec. 13, 1877, 5 C. L. O. 5.

28. The annual expenditure upon mining claims may be made in running a tunnel. Com'r to John Hunter, 5 C. L. O. 34.

Sutro Tunnel.

29. In applications for patent on the Comstock lode hearings may be had to determine whether they have been benefited or drained by the Sutro tunnel. Brunswick Mine, 3 C. L. O. 114.

30. The only patents for mining claims which should contain the conditions specified in the act of July 25, 1866, are such as may be issued for claims on the Comstock lode. Sutro Tunnel Co., 3 C. L. O. 34.

31. Lands west of the Comstock lode are included in the grant to A. Sutro. Sutro Tunnel Co., 8 C. L. O. 54.

32. Annual expenditures on mines within limits of grant (Sutro Tunnel) are not required. Sutro Tunnel, 8 C. L. O. 54.

33. What is the Comstock lode? Question discussed. Sutro Tunnel, 3 C. L. O. 34.

POSSESSORY TITLE.

MINING DISTRICTS.

I. THE STATUTE.
II. REGULATIONS.
III. DECISIONS.

I. THE STATUTE.

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. 17 Stat. 92; 18 Stat. 61; 19 Stat. 52; 21 Stat. 61; sec. 2324, U. S. Rev. Stat.

II. REGULATIONS.

12. It is provided by the Revised Statutes that the miners of each district may make rules and regulations not in conflict with the laws of the United States, or of the State or Territory in which such districts are respectively situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. They likewise require that the location shall be so distinctly marked on the ground that its boundaries may be readily traced. This is a very important matter, and locators cannot exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by reference to some natural object or permanent monument, as will identify the claim.

III. DECISIONS.

1. What are the laws of a mining district is a question of fact for the General Land Office. Parley's Park Silver M. Co. v. Kerr, 130 U. S. 256.

2. Mining district rules are a part of the law of the land. Morton v. Solambo M. Co., 26 Cal. 527; 4 Mor. Min. Rep. 463; Gropper v. King, 1 Pac. Rep. 755.

3. When there are written rules or regulations of a mining district, parol evidence cannot be given of a mining custom. Ralston v. Plowman, 1 Idaho, 595; 5 Mor. Min. Rep. 160.

4. Where written district regulations are of doubtful force, parol evidence of local customs is admissible. Colman v. Clements, 23 Cal. 245; 5 Mor. Min. Rep. 247.

5. The book containing local mining regulations is competent evidence under section 504, Civil Practice Act. Orr v. Haskell, 2 Mont. 225; 4 Mor. Min. Rep. 492.

6. The rules and customs of a mining district may be proven by a written rule if such exists, or by any competent evidence of a custom. Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

7. While the local record of a mining community is the best evidence of the rules and customs governing mining interests, it is not the best or only evidence of priority or extent of actual possession. Campbell v. Rankin, 99 U. S. 261; 12 Mor. Min. Rep. 257.

8. Evidence of the local mining rules must consist of a copy from the proper custodian, who must be shown to be empowered to give certified copies thereof, and to certify that such was a copy of the laws then in force in such district. Roberts v. Wilson, 1 Utah, 292; 4 Mor. Min. Rep. 498.

9. Mining district rules must be offered in evidence as a whole. English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202.

10. In the absence of a statute, a purported copy of mining district regulations must be shown by proper testimony to have come from the proper custody and be otherwise proven to be what it purports to be, and cannot be rendered admissible by submission of *ex parte* affidavits. Roberts v. Wilson, 1 Utah, 292; 4 Mor. Min. Rep. 498.

11. Proof of a record of a location is inadmissible unless a record is shown to be provided for by local statute or regulations. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

12. District rules to be obligatory upon all must be clear and specific, not optional. Flaherty v. Gwinn, 1 Dak. 509; 12 Mor. Min. Rep. 605.

13. The regularity of the adoption of mining district laws will not be inquired into by the courts if they are acknowledged by the miners. Gore v. McBrayer, 18 Cal. 582; 1 Mor. Min. Rep. 645.

14. After adoption, a mining district regulation is presumed to have continued in force, in the absence of a showing to the contrary. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

15. The existence and tenor of mining district regulations and customs are questions for the jury. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

16. The existence of a mining district rule or custom is a question of fact to be tried by the jury. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

17. The existence and force of mining district regulations are questions of fact for the jury. Harvey v. Ryan, 42 Cal. 626; 4 Mor. Min. Rep. 490.

18. The existence of mining district regulations is a question of fact. Parley's Park S. M. Co. v. Kerr, 130 U. S. 256; Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487.

19. The existence of miners' rules or regulations are matters of fact to be proven in the usual manner. Poujade v. Ryan, 21 Nev. 449; 33 Pac. Rep. 659; Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; King v. Edwards, 1 Mont. 205; 4 Mor. Min. Rep. 480; Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487; Harvey v. Ryan, 42 Cal. 626; 4 Mor. Min. Rep. 490.

20. The existence of mining district regulations or customs must be proven like any other fact, by the best evidence, and parol testimony as to a custom should not be admitted when it is shown that there are duly recorded regulations. Ralston v. Plowman, 1 Idaho, 595; 5 Mor. Min. Rep. 160.

21. The existence of mining district regulations has received legislative sanction in Montana. Orr v. Haskell, 2 Mont. 225; 4 Mor. Min. Rep. 492.

22. To be of effect, a mining district regulation must be in accordance with the laws of the United States and of the State; must have been established and must be in force, as it does not, like a statute, acquire validity

by its mere enactment, but from the customary obedience and acquiescence of the miners, after its enactment. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

23. Mining district regulations, to be considered, must be shown to be in force. Harvey v. Ryan, 42 Cal. 626; 4 Mor. Min. Rep. 490; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

24. A mining district regulation must be in force at the time in order to be of effect. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

25. Whether or not a miner's rule or custom is in force at a given time is a question of fact for the jury. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

26. Whether or not a mining district rule or regulation has been established and is in force is a question of fact for the jury. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

27. It is presumed that the written laws of a mining district are in force, and any custom which conflicts with them must be clearly proved. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

28. Mining district rules may be shown to be in force by custom or usage, without proof of formal adoption, or of a written record. Flaherty v. Gwinn, 1 Dak. 509; 12 Mor. Min. Rep. 605.

29. A custom, reasonable in itself and generally observed, will prevail against a written regulation fallen into disuse. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Harvey v. Ryan, 42 Cal. 626; 4 Mor. Min. Rep. 490.

30. The extent of a mining district may be changed by those who created it, if vested rights are not thereby interfered with. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

31. The customs of miners constitute the common law of mining, and have been recognized by National and State statutes and by the courts. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

32. The rules and customs of miners, reasonable in themselves and not in conflict with any higher law, are recognized by legislative enactments and judicial decisions as a part of the law of this country. Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 824.

33. Congress recognized the possessory right of miners under the rules of the mining districts, but in doing this it has not parted with its title to the land. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183.

34. The mining customs of any particular mining district have the force and effect of laws, in other words, are laws. They form the American common law on mining rights. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

35. To be recognized, a mining district rule must not only have been enacted or adopted, but must be recognized by the miners, and must be in force. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

36. Congress has given to the local laws and customs of miners the force and effect of laws, so far as they are not in conflict with any superior law. McCornick v. Varnes, 2 Utah, 355; 9 Mor. Min. Rep. 505. See Steel v. St. Louis Sm. Co., 106 U. S. 447.

37. "The Land Department of the government and this court also, have always acted upon the rule that all mineral locations were to be governed by the local rules and customs in force at the time of the location, when such location was made prior to the passage of any mineral law by Congress." Glacier Mtn. S. M. Co. v. Willis, 127 U. S. 471. (Citing Jennison v. Kirk, 98 U. S. 453; Broder v. Natoma Water & M. Co., 101 U. S. 274; Jackson v. Roby, 109 U. S. 440; Chambers v. Harrington, 111 U. S. 350.)

38. Section 9 of the act of 1866 is not retroactive in its effect, and patents theretofore granted are not affected thereby. Said act merely recognized and confirmed rights held under local customs, laws and decisions. Union Mtn. M. Co. v. Ferris, 2 Sawy. 176; 8 Mor. Min. Rep. 90.

39. The Land Department cannot interfere in disputes between miners as to the affairs of a mining district. Its sole duty is to recognize the local laws when not in conflict with statutes, State and National. Com'r to J. N. Barker, Jan. 9, 1892.

40. Compliance with miners' regulations and customs in force is necessary to the validity of a location. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304 (second trial, 17 Colo. 243; 29 Pac. Rep. 173); Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487; Cons. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

41. To prevail in an adverse suit a party, whether plaintiff or defendant, must show, not mere occupancy of the premises in controversy, but a compliance with law, customs and regulations. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304 (second trial, 17 Colo. 243; 29 Pac. Rep. 173); Bryan v. McCaig, 10 Colo. 309; 15 Pac. Rep. 413.

42. The rules and customs which point out the manner of locating mining claims are conditions precedent, which must be substantially complied with. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

43. The mining rules and regulations of a district (1865) govern the location of claims and maintenance thereof, and must be followed. Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188; 1 Mor. Min. Rep. 17.

44. The location must be made in compliance with the United States laws and with miners' rules and regulations. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

45. A forfeiture may take place by failing to comply with local rules and regulations of miners. St. John v. Kidd, 26 Cal. 263; 4 Mor. Min. Rep. 454.

46. The law presumes that locators forfeit their rights by failing to comply with local rules and customs relative to annual work, although no penalty is specified by such rules and customs. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

47. The failure of a party to comply with a mining rule or regulation cannot work a forfeiture of his title thereto, unless the rule so provides. Rush v. French, 1 Ariz. 99; 25 Pac. Rep. 816; Johnson v. McLaughlin, 1 Ariz. 498; 4 Pac. Rep. 180; McGarrity v. Byington, 12 Cal. 426 (1859); 2 Mor. Min. Rep. 311; Bell v. Bed Rock T. & M. Co., 36 Cal. 214; 1 Mor. Min. Rep. 45; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411. *Contra*, King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

48. Forfeiture of a mining claim under mining laws must be specially pleaded, and cannot be shown under the general issue. Morenhaut v. Wilson, 52 Cal. 263; 1 Mor. Min. Rep. 53.

49. Error in the notice of location in a particular not essential under the law or regulations and customs of miners is harmless and does not vitiate a description otherwise good. Metcalf v. Prescott, 10 Mont. 283; 25 Pac. Rep. 1037. (Citing Gamer v. Glenn, 8 Mont. 371; 20 Pac. Rep. 654; Flavin v. Mattingly, 8 Mont. 242; 19 Pac. Rep. 384; Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291.)

50. "A person who makes a valid location of a mineral ledge or lode, and complies with the laws and the local mining rules in respect thereto obtains a vested right to such property, of which he cannot be divested." Blake v. Butte S. M. Co., 2 Utah, 54; 9 Mor. Min. Rep. 503.

51. The right to a mining claim vests by the taking thereof in accordance with local rules. McGarrity v. Byington, 12 Cal. 426; 2 Mor. Min. Rep. 311 (1859); Dutch Flat Water Co. v. Mooney, 12 Cal. 534 (1859).

52. The right to occupy, explore, and extract the precious metals in the mineral lands of the United States becomes vested in the party who located these lands according to local rules and customs of the mining district in which they are situated. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

53. It is presumed, in the absence of evidence, that parties in possession of mining claims hold them according to the rules and customs of the miners in the district. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

54. A person who makes improvements upon public land, knowing that he has no title, and that the land is open to exploration and sale for its minerals, and makes no effort to secure the title to it as such, under the laws of Congress, or a right of possession under the local customs and rules of miners, has no claim to compensation for his improvements as an adverse holder in good faith, when such sale is made to another and

the title is passed to him by a patent of the United States. Sparks v. Pierce, 115 U. S. 408.

55. When plaintiff's ownership and right of possession are put in issue by answer, he must show affirmatively compliance with the act of Congress and local rules and regulations, and that he had thereby made a valid location. Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291.

56. Actual possession of a portion of a mining claim, according to the custom of miners in a given locality, extends by construction to the limits of the claim held in accordance with such customs. Hicks v. Bell, 3 Hepburn, 220 (1853).

57. A party claiming mining ground not actually possessed, and beyond the *possessio pedis*, must show his right thereto by constructive possession, and he can show such constructive possession only by physical works and monuments, or by compliance with local mining laws and rules. Roberts v. Wilson, 1 Utah, 292; 4 Mor. Min. Rep. 498.

58. Possession is good only as to that portion of the claim actually occupied and worked, unless the boundaries were plainly and prominently marked, or there was some local regulation giving possession of the whole of the ground claimed. Hess v. Winder, 30 Cal. 349 (1865); 12 Mor. Min. Rep. 217.

59. One attempting to hold by prior possession without reference to local mining customs must give notice to others by actual physical marks or monuments. If this is not done he can only hold to the extent of the land actually occupied and worked, as against others. Hess v. Winder, 30 Cal. 349 (1865); 12 Mor. Min. Rep. 217.

60. Where all the rules, laws, regulations and customs with reference to a mining claim have been complied with, a property right, prior to the issuance of patent, has been acquired that can be transferred or inherited. Suessenbach v. First National Bank, 5 Dak. 477; 41 N. W. Rep. 662.

61. The first locators of mining ground can work the claim with reasonable care and diligence; but a mining custom which would allow the total destruction of a junior location in a gulch below the prior location on ground which was vacant, cannot be maintained under any statute or common mining law. Lincoln v. Rogers, 1 Mont. 217 (1870).

62. "A mining claim is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining laws, local and statutory. It must under the law of Congress of 1872 (R. S., sec. 2320), be located upon at least one known vein or lode, but the vein or lode is not the whole claim." Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

63. Before statutory enactment, the manner of locating mining claims and maintaining such locations was governed by miners' rules and customs, and compliance therewith was necessary to constitute a valid location or to maintain one. Cons. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

64. An adverse complaint must allege a location to have been made in accordance with mining district rules, and proof of compliance with them must be made. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304 (second trial, 17 Colo. 243; 29 Pac. Rep. 173); Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487; Cons. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

65. In an adverse suit each party must prove his right to a patent by a compliance with the statutes, State and Federal, and miners' rules and regulations in force relative to location, in order to recover a judgment for the ground in controversy. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304 (second trial, 17 Colo. 243; 29 Pac. Rep. 173).

66. A misdescription in the notice of the claimant to a quartz lead, posted up near the premises, in pursuance of the requirements of the mining laws of the district in which the land is situated, and where the lead is under ground and undeveloped, will not vitiate the claim. Johnson v. Parks, 10 Cal. 446 (1858); 4 Mor. Min. Rep. 816.

67. The fact that land is covered by a water right, held by local laws, will not bar entry thereof as a mill site. Charles Lennig, 5 L. D. 190.

68. The failure of an applicant to comply with local regulations will not justify suit by the United States to vacate the patent issued to him. Such failure should be made the subject of an adverse claim or protest during the

pendency of the application. Robert Hawke, 5 L. D. 131.

69. Failure by one-third of the miners of a certain mining district to comply with State and local rules does not render applicable the maxim "*communis error facit jus.*" O'Donnell v. Glenn, 9 Mont. 452; 23 Pac. Rep. 1018.

70. Mining district regulations may restrict placer locations to eighty rods in length. Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324; Landale v. Ives, 2 Idaho, 244.

71. The width of mining claims may be limited by local laws or regulations to twenty-five feet on each side of the middle of the vein. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

72. A regulation of a mining district requiring more work to be done to hold the claim than is required by United States law is void. Original M. Co. v. Winthrop M. Co., 60 Cal. 631.

73. Rules and customs of one district cannot be introduced to vary those of another district. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

74. A local mining regulation or custom adopted after location of a claim cannot be given in evidence to limit the extent of a claim previously located. Table Mtn. Tunnel Co. v. Stranahan, 20 Cal. 198; 81 Cal. 387 (1865); 9 Mor. Min. Rep. 457.

75. All mining rules and customs must be reasonable. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

76. Mining customs need not, like customs at common law, be shown to have been of long duration. Smith v. North American M. Co., 1 Nev. 423; 13 Mor. Min. Rep. 599.

77. Written mining district regulations, once adopted, are presumed to continue in force in absence of showing to the contrary. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Riborado v. Quang Pang M. Co., 2 Idaho, 131; 6 Pac. Rep. 125; King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

78. Mining district regulations established and recognized, have all the effect of legislative enactments. Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188; 1 Mor. Min. Rep. 17.

79. Local rules and customs of miners recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. Jennison v. Kirk, 98 U. S. 453. (Affirming Titcomb v. Kirk, 51 Cal. 288; 5 Mor. Min. Rep. 10.)

80. In the absence of a local custom allowing it, one miner has no right to run a tail-race or flume over the claim of another, and the owner of such claim may fill up such race or flume by tailings deposited on his own ground. Ralston v. Plowman, 1 Idaho, 595; 5 Mor. Min. Rep. 160.

81. In the absence of local statutes or regulations, a discoverer has a reasonable time within which to perfect his location. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

82. In the absence of local statutes or regulations, a discoverer has no time for marking his claim after discovery, but must proceed with diligence to perfect his location. Patterson v. Tarbell, 26 Oreg. 29; 37 Pac. Rep. 76.

83. In the absence of a local statute or regulation, there is no law which requires the locator of a mining claim to record a notice of location. Haws v. Victoria Copper M. Co., 160 U. S. 303; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Harvey v. Ryan, 42 Cal. 626; 4 Mor. Min. Rep. 490; Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182; Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 183; Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419; Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487; King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480; Golden Fleece G. & S. M. Co. v. Cable Cons. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; 9 Mor. Min. Rep. 513; Poujade v. Ryan, 21 Nev. 449; 33 Pac. Rep. 659; Allen v. Dunlap, 24 Oreg. 229; 33 Pac. Rep. 675; Carter v. Bacigalupi, 23 Pac. Rep. 361.

84. The United States laws do not require location certificates to be recorded. This is governed only by State or mining district laws. Moxon v. Wilkinson, 2 Mont. 421; 12 Mor. Min. Rep. 602; Gamer v. Glenn, 8 Mont. 371; 20 Pac. Rep. 654; Freezer v. Sweeney, 8 Mont. 508; 21 Pac. Rep. 20; Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 183.

85. Record of a location is required, if at all, by local laws or regulations. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

86. Record of a location is not required by the United States law in the absence of State statutes or local regulations. Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; 9 Mor. Min. Rep. 513.

87. In the absence of a regulation of an organized mining district or a local statute, a notice of a mining location should be filed for record in the office of the county recorder of deeds. Rose Nos. 1 and 2 Lodes, 22 L. D. 83.

88. In the absence of a custom requiring it, the recording of a mining location is not necessary to give it validity; and where such a custom does exist, the fact that the notice is recorded before it is posted is not material. Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182.

89. In the absence of local statutes or rules, a claim is sufficiently marked if a stake be placed at the center of each end with a notice describing the length and width of the claim. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

90. In the absence of a local statute or regulation, a stake at each end of the lode line, properly marked, is a sufficient marking of the boundaries of a claim, as the boundaries may be traced from a definitely fixed center line. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429. (Refusing to follow Holland v. Mt. Auburn G. Q. M. Co., 53 Cal. 149; 9 Mor. Min. Rep. 497; Gelcich v. Moriarty, 53 Cal. 217; 9 Mor. Min. Rep. 498.)

91. Marking by placing a stake at the discovery point, and one at the center of each end, on the croppings, is sufficient, in the absence of local statutes or regulations to the contrary, without marking the corners of the claim. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

92. No particular mode of marking is required in the absence of local laws or regulations. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

93. In the absence of local statutory requirement, a location notice recorded need not be a copy of the notice posted on the claim, as the United States law does not require any notice to be posted on claim. Gird v. California Oil Co., 60 Fed. Rep. 531.

94. When no mining regulations or customs are in force in a district where a mining claim is located, general customs then in force may be given in evidence upon the question of the reasonableness of its extent. A general uniform custom should be proved, if one exists. Table Mtn. Tunnel Co. v. Stranahan, 20 Cal. 198; 9 Mor. Min. Rep. 457; 81 Cal. 387 (1865).

95. In the absence of local regulations, the quantity of mining ground which may be located is restricted to a reasonable area. This question will be determined by the general usages and customs prevailing upon the subject. Table Mtn. Tunnel Co. v. Stranahan, 20 Cal. 198 (1862); 9 Mor. Min. Rep. 457.

96. In the absence of local statutes or rules, writing is not necessary to the conveyance of a mining claim. Lockhart v. Rollins, 2 Idaho, 503; 21 Pac. Rep. 413.

97. Miners' rules required possession of a mining claim to be predicated on a discovery and maintained by development work. Cons. Rep. Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490. (Following Jennison v. Kirk, 98 U. S. 453.)

98. Local regulations requiring certain assessment work to be done on each location, held not to mean that it must be done on every two hundred feet of the entire claim held by several persons, but on the whole claim, irrespective of the number of locations or feet. Leet v. John Dare S. M. Co., 6 Nev. 218; 4 Mor. Min. Rep. 487.

99. The quantity of ground a miner can claim by location, or prior appropriation for mining purposes, may be limited by the mining rules of the district, but such rules cannot limit the quantity of ground or the number of claims a party may acquire by purchase. Prosser v. Parks, 18 Cal. 47 (1861); 4 Mor. Min. Rep. 452.

100. The mere fact that a suit involves proof and construction of local mining laws, rules and regulations will not justify removal of the case to a Federal court as a case arising under the laws of the United States. Trafton v. Nougues, 4 Sawy. 178.

101. The jurisdiction of the State or the mining district is limited to laws and rules affecting extent and manner of working min-

ing claims. Territory v. Lee, 2 Mont. 124; 6 Mor. Min. Rep. 248.

102. Judicial notice will not be taken of mining district regulations. They must be proven like any other fact. Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487.

103. State laws or local regulations cannot relieve mine holders from the requirement of the United States laws with regard to annual expenditures for the benefit of claims. Sweet v. Webber, 7 Colo. 443; 4 Pac. Rep. 752; 4 West Coast Rep. 116.

104. The legality of mining district regulations must be decided by the court, and not left to the jury. Ralston v. Plowman, 1 Idaho, 595; 5 Mor. Min. Rep. 160.

105. Where local rules of miners exist, controversies affecting a mining right must be determined by the customs and usages of the bar or diggings where such right is asserted or denied, whether such customs are written or unwritten. Morton v. Solambo M. Co., 26 Cal. 527; 4 Mor. Min. Rep. 463.

106. The question of possession of mining claims under the California laws, rules, and customs, discussed. Atwood v. Fricot, 17 Cal. 37 (1860–61); 2 Mor. Min. Rep. 305; English v. Johnson, 17 Cal. 107 (1860–61); 12 Mor. Min. Rep. 202.

107. Courts must construe local mining rules and customs, and require owners of mining ground to develop and work such ground if consistent with law. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

108. Mining district laws when introduced in evidence are to be construed by the court, and whether by virtue of such laws a forfeiture has accrued is a question of law and cannot be submitted to the jury. Fairbanks v. Woodhouse, 6 Cal. 83 (1856); 12 Mor. Min. Rep. 86.

109. When the regulations of a mining locality require that every mining claim shall be worked two days in every ten, *held*, that the efforts of the owners to procure machinery for working the claim are by fair intendment to be considered as work done on the claim. Packer v. Heaton, 9 Cal. 568; 4 Mor. Min. Rep. 447 (1858); McGarrity v. Byington, 12 Cal. 426 (1859); 2 Mor. Min. Rep. 311.

110. Where parties' rights to a mining claim are fixed by the rules of property, which are a part of the general law of the land, they cannot be diverted by any mere neighborhood custom or regulation. Waring v. Crow, 11 Cal. 366 (1858); 5 Mor. Min. Rep. 204.

111. If a patent is issued contrary to the regulations of a mining district in force, it is void, at least in so far as it is so in conflict, and may be attacked collaterally. Parley's Park S. M. Co. v. Kerr, 130 U. S. 256.

112. A location made prior to the mining act of 1866 is valid if made according to the then existing local laws and customs. Glacier Mtn. S. M. Co. v. Willis, 127 U. S. 471.

113. A corporation interested in mining may be represented by an officer or agent at a meeting of miners called to frame mining district rules and regulations. McKinley v. Wheeler, 130 U. S. 630.

114. It is not within the province of the General Land Office to instruct mining recorders. Com'r to J. O. Fain, Jan. 18, 1892.

LOCATION.

I. THE STATUTE.
II. REGULATIONS.
III. DECISIONS.
1. *Marking.*
2. *Posting.*
3. *Record.*
4. *Relocation.*
5. *General.*

I. THE STATUTE.

(See sec. 2324, U. S. Rev. Stat., p. 70.)

II. REGULATIONS.

9. From and after the 10th May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet*, but in no event can a location of a vein or lode made subsequent to May 10, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

10. With regard to the extent of surface-ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case *exceed three hundred feet on each side of the middle of the vein at*

the surface, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end-lines of such claims to be in all cases parallel to each other. Said lateral measurements cannot extend beyond three hundred feet on *either* side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet cannot be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration *where* the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

11. By the foregoing it will be perceived that no lode-claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface-ground of that width can be taken, depends upon the local regulations or State or Territorial laws in force in the several mining-districts; and that no such local regulations or State or Territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width, unless adverse claims existing on the 10th day of May, 1872 render such lateral limitation necessary.

13. The statutes provide that no lode-claim shall be recorded until after the discovery of a vein or lode within the limits of the claim located, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

14. The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft, or run a tunnel or drift, to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery-shaft on the claim to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district, and should be duly recorded.

15. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface-ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery; it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery-point.

16. Within a reasonable time, say twenty days after the location shall have been marked on the ground, or such time as is allowed by the local laws, notice thereof, accurately describing the claim in manner aforesaid, should be filed for record with the proper recorder of the district, who will thereupon issue the usual certificate of location.

III. Decisions.

1. *Marking.*

1. A location must be marked to be valid. Newbill v. Thurston, 65 Cal. 419; 4 Pac. Rep. 409; Pharis v. Muldoon, 75 Cal. 284; 17 Pac. Rep. 70; Neuebaumer v. Woodman, 89 Cal. 310; 26 Pac. Rep. 900; Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304 (second trial, 17 Colo. 243; 29 Pac. Rep. 173); Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429; George S. Dodge, 6 C. L. O. 122.

2. In the absence of a statute a discoverer has no time in which to mark his location; but he must proceed with diligence to perfect the same. Patterson v. Tarbell, 26 Oreg. 29; 37 Pac. Rep. 76; Newbill v. Thurston, 65 Cal. 419; 4 Pac. Rep. 409.

3. Thirty days from posting of discovery notice is a reasonable time within which to mark the boundaries of the claim. Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

4. In the absence of a statute a locator has a reasonable time within which to stake his claim after discovery and posting of notice. (Twenty days held to be a reasonable time.) Doe v. Waterloo M. Co., 55 Fed. Rep. 11.

5. If a location is marked before the intervention of adverse rights it is valid. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

6. "All that was intended is that a person seeking to make a subsequent location could go upon the ground referred to, and from the marks made, find the boundaries of the claim." West Granite Mtn. M. Co. v. Granite Mtn. M. Co., 7 Mont. 356; 17 Pac. Rep. 547; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 527; Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429; Taylor v. Middleton, 67 Cal. 656; 8 Pac. Rep. 594; 15 Mor. Min. Rep. 284; Anderson v. Black, 70 Cal. 230; 11 Pac. Rep. 700; Doe v. Tyler, 14 Pac. Rep. 376.

7. No particular mode of marking is required in the absence of local laws or regulations. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

8. Posts to mark a mining location should be kept in position in order to determine the rights of the locator therein. "But whether or not a claimant with a true record must keep good his surface monuments, we need not say; the record in this case on the theory of the record was not a true record." Pollard v. Shively, 5 Colo. 309; 2 Mor. Min. Rep. 229.

9. The requirement of the Colorado statute, that the side posts be placed in the side lines, is satisfied if they be substantially at the center. Where there is a discrepancy of one hundred and fifty feet they cannot be said to be in the center. Pollard v. Shively, 5 Colo. 309; 2 Mor. Min. Rep. 229.

10. The location was marked by stakes set for corners upon four neighboring claims. The surface ground within the stakes was three hundred feet wide by six hundred feet long. The marking of the claim was held to be sufficient under section 2324, United States Revised Statutes. (Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. Rep. 714, distinguished.) West Granite Mtn. M. Co. v. Granite Mtn. M. Co., 7 Mont. 356; 17 Pac. Rep. 547.

11. A mining claim marked by a discovery monument on which is placed the notice of location, and by a stake at each of the three corners of the claim, and a monument at the center of each end line, leaving one corner of the claim unmarked, is sufficiently marked under section 2324, United States Revised Statutes, providing that the claim shall be "distinctly marked so that the boundaries can be readily traced." Warnock v. De Witt, 11 Utah, 324; 40 Pac. Rep. 205.

12. Where the boundaries of a claim are not kept marked, the owner will not be allowed to say that his boundaries were not correctly described in his record of location as against one whose location did not conflict with the prior location as described on the record. Pollard v. Shively, 5 Colo. 309; 2 Mor. Min. Rep. 229.

13. "A subsequent locator cannot object that a prior location of a mining claim was not sufficiently marked on the ground at the time of its location, provided such prior location was sufficiently marked on the ground before such subsequent locator made any location or acquired any rights in such claim." North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

14. The marking of a claim done by a trespasser may be adopted by the discoverer. Miller v. Taylor, 6 Colo. 41; 9 Mor. Min. Rep. 547.

15. Where a location notice calls for a post to mark the corner, it is not admissible on part of claimant to show said corner to be marked by a stump. Pollard v. Shively, 5 Colo. 309; 2 Mor. Min. Rep. 229.

16. When the lode line is defined, if the number of feet of surface ground on each side thereof is known, the location is sufficiently marked, as its boundaries can be readily ascertained. Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

17. Where a miner alleges that his recorded location notice does not correctly describe his claim, he must show clearly that his claim was plainly marked on the ground in order to defeat the claim of a subsequent locator of a conflicting claim. Pollard v. Shively, 5 Colo. 309; 2 Mor. Min. Rep. 229.

18. As to what is a sufficient monument or natural object, see Quimby v. Boyd, 8 Colo. 194; 6 Pac. Rep. 462; Gilpin County M. Co. v. Drake, 8 Colo. 590; 9 Pac. Rep. 787; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Faxon v. Barnard, 2 McCrary, 44; 1 Colo. Law Rep. 147; 9 Mor. Min. Rep. 515.

19. A tree, if sufficiently described, may be a good monument to mark a location. Quimby v. Boyd, 8 Colo. 194; 6 Pac. Rep. 462.

20. A description giving other claims for boundaries may be good if these claims are themselves properly marked. Russell v. Chumasero, 4 Mont. 309; 1 Pac. Rep. 713; 15 Mor. Min. Rep. 508.

21. Stakes and monuments at each corner of the claim and at the center of each end line is a sufficient marking under the most stringent construction of the law. Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; 9 Mor. Min. Rep. 513.

22. The act of May 10, 1872, section 2324, United States Revised Statutes, requires locations to be distinctly marked upon the ground so that their boundaries may be readily traced; and an application for the survey of a claim located subsequent to that date, which does not show the law to have been complied with in this respect, should be denied by the United States Surveyor General. Philip Dephanger, 1 L. D. 581.

23. The questions of abandonment and of sufficiency of location markings are for a jury to decide. Taylor v. Middleton, 67 Cal. 656; 8 Pac. Rep. 594; 15 Mor. Min. Rep. 284.

24. Stakes or stones may be permanent monuments. A mining claim may be described also by reference to neighboring claims. Russell v. Chumasero, 4 Mont. 309; 1 Pac. Rep. 713; 15 Mor. Min. Rep. 508.

25. A locator marked the corners of end lines, and placed a stake or a blazed tree at each corner of the claim, and in places "brushed out" the lines so that a person could get through, and placed a notice in the center of the claim defining its boundaries. *Held*, that this was a sufficient compliance with the statute in the matter of marking the claim. Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 183.

26. The posting of notice on a monument claiming seven hundred and fifty feet easterly and seven hundred and fifty feet westerly, with surface ground three hundred feet in width on each side of the lode, is not a sufficient marking of the claim under section 2324, United States Revised Statutes. Gelcich v. Moriarty, 53 Cal. 317; 9 Mor. Min. Rep. 498.

27. Proper marking of a location before the intervention of adverse rights will validate the location from the date of such marking. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

28. The location notice recited that the west end corners were marked by pine trees. The evidence disclosed that it was distinctly marked on the ground, but that there were stakes at the west end corners instead of pine trees. The notice referred to another claim as a permanent monument. *Held*, that this was a sufficient notice. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

29. The marking of the surface boundaries is necessary to a valid location. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

30. How locations may be marked. Eilers v. Boatman, 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462. See S. C., 111 U. S. 356; 15 Mor. Min. Rep. 471.

31. A lode mining claim may not exceed fifteen hundred feet in length by six hundred feet in width. No markings of the location outside of those limits are to be considered, as no one is required to look beyond such limits for location monuments. Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. Rep. 714; Leggatt v. Stewart, 5 Mont. 107; 2 Pac. Rep. 320; 15 Mor. Min. Rep. 358.

32. The fact that the location stakes are set on claims adjoining does not render the location void. West Granite Mtn. M. Co. v. Granite Mtn. M. Co., 7 Mont. 356; 17 Pac. Rep. 547.

33. The testimony of an eye-witness to the staking of a claim is not required to establish the fact that the claim had been staked. Doe v. Waterloo M. Co., 55 Fed. Rep. 11.

34. Because one corner of a claim is not marked, it does not follow as a necessary legal conclusion that the claim was not legally marked on the ground. Anderson v. Black, 70 Cal. 226; 11 Pac. Rep. 700.

35. The location need be marked only once if the locator remains in possession and does the work necessary to maintain his location. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

36. A mining claim must be plainly marked on the ground. Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217.

37. "Every mining location, whether lode or placer, on surveyed or unsurveyed land, should be distinctly marked on the ground so that its boundaries can be readily traced. See sec. 2324, U. S. Rev. Stats. Therefore in my judgment it would be necessary to properly stake a placer location, although the same is upon and conforms to legal subdivisions." Com'r to John E. Elbert, Aug. 19, 1889, 16 C. L. O. 123.

38. A placer taken by legal subdivisions must be staked. "The purpose of the requirement that the claimant shall mark the boundaries of his claim is to inform other miners as to what portion of the ground is already occupied. The men for whose information the boundaries are required to be marked wander over the mountains with a very small outfit. They do not take surveyors with them to ascertain where the section lines run, and ordinarily it would do them no good to be informed that a quarter-section of a particular number had been taken up. For this reason it is required that the boundaries shall be distinctly marked upon the ground." White v. Lee, 78 Cal. 598; 21 Pac. Rep. 363; Gregory v. Pershbaker, 73 Cal. 109; 14 Pac. Rep. 401; 15 Mor. Min. Rep. 602; Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419. *Contra:* A placer location taken by legal subdivisions need not be staked. Reins v. Murray, 22 L. D. 409.

39. A placer claim must be staked. (In this case the placer was not taken by legal subdivisions.) Sweet v. Webber, 7 Colo. 443; 4 Pac. Rep. 752; 4 West Coast Rep. 116.

40. The staking of every twenty acres of a placer claim is not required. McDonald v. Montana Wood Co., 35 Pac. Rep. 668.

41. The boundaries of a claim and the record must correspond. Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. Rep. 714.

42. To make the grant effectual, the location must be distinctly marked on the ground, and the record must contain such a description as will identify the claim by reference to some natural object or permanent monument. Neither the grant nor the right of possession attaches to locations that do not give the notice required. Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. Rep. 714.

43. In the absence of a local statute or regulation, a stake at each end of the lode line properly marked is a sufficient marking of the boundaries of a claim, as the boundaries may be traced from a definitely fixed center line. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429. (Refusing to follow Holland v. Mt. Auburn G. Q. M. Co., 53 Cal. 149; 9 Mor. Min. Rep. 497; Gelcich v. Moriarty, 53 Cal. 217; 9 Mor. Min. Rep. 498.

44. In the absence of local statutes or regulations, if the center of the claim is marked by stakes or monuments at each end, with a written notice on one or both describing the claim as extending from stake to stake, with a certain number of feet surface on each side of said line, the law as to marking of the claim is complied with. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

45. After discovery the discoverer has a reasonable time within which to trace his lode and to mark the surface lines of his claim. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

46. Marking by placing a stake at the discovery point, and one at the center of each end, on the croppings, is sufficient, in the absence of local statutes or regulations to the contrary, without marking the corners of the claim. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

47. A locator must use reasonable diligence in maintaining his location stakes, but is not required, *absolutely*, to keep them standing constantly. McEvoy v. Hyman, 25 Fed. Rep. 596; 15 Mor. Min. Rep. 397.

48. The positive testimony of witnesses who saw the stakes marking a mining claim is of greater weight, aside from any question of credibility, than negative testimony of witnesses who did not find any stakes. McEvoy v. Hyman, 25 Fed. Rep. 596; 15 Mor. Min. Rep. 397.

49. The limits of a patented mining claim may be identified by location monuments when the description of the claim in the patent, by courses and distances, is found to be incorrect. Cullacott v. Cash G. & S. M. Co., 8 Colo. 179; 16 Pac. Rep. 211; 15 Mor. Min. Rep. 392.

50. The physical marks sufficient to serve as notice of the possession of a mining claim must be sufficient to be found by one hon-

estly concerned to discover whether the land has been previously appropriated for mining purposes. Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217.

51. Possession is effective only as to that portion of a claim actually occupied and worked, unless the boundaries were plainly and prominently marked, or there was some local regulation extending actual possession of part of the ground claimed to a constructive possession of the whole. Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217 (1865).

52. The length of a lode location is limited by law to fifteen hundred feet, and the area bounded by the location stakes must be within that limit, and a location of a greater length is void in its entirety. Leggatt v. Stewart, 5 Mont. 107; 2 Pac. Rep. 320; 15 Mor. Min. Rep. 358. (Following Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. Rep. 714.)

53. Exactness in running the lines or fixing the corners of a location is neither expected nor required of a locator. Eilers v. Boatman, 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462. See 111 U. S. 356; 15 Mor. Min. Rep. 471.

54. The validity of a location is not affected by the fact that one end thereof, being on precipitous, inaccessible ground, is not marked, if the remainder is so marked that the boundaries of the whole claim may be easily ascertained. Eilers v. Boatman, 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462. See 111 U. S. 356; 15 Mor. Min. Rep. 471.

55. Whether or not a location is so marked on the ground that its boundaries may be readily ascertained is a question of fact. Eilers v. Boatman, 111 U. S. 356; 15 Mor. Min. Rep. 471. See 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462.

56. The marking of the corners of the claim and posting a location notice is a sufficient marking of the claim to enable the boundaries to be readily ascertained. Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341.

57. The position of corners of the claim as found on the ground should be shown by the plat and field-notes of a mineral survey. Com'r to Surveyor General of Nevada, 1 L. D. 581.

58. After applying for patent and giving due notice thereof, claimant need not maintain the boundary stakes of his location. Byrne v. Slauson, 20 L. D. 43.

59. The United States law does not define or prescribe the particular kind of marks which shall be made upon a mining location nor upon what part of the claim they shall be placed. Any marking upon the ground claimed, by stakes and mounds and written notices, whereby the boundaries of the claim may be readily traced, is sufficient. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

2. *Posting.*

60. The posting of notice at the discovery and staking the claim and marking the same by blazed trees, etc., is a sufficient marking of the location under section 2324, United States Revised Statutes. Allen v. Dunlap, 24 Oreg. 229; 33 Pac. Rep. 675.

61. The United States law does not require the posting or recording of a location notice, but recognizes the power of miners to require such notice to be recorded; but the mere recording of a notice, before a location is made on the ground, is a nullity. Gregory v. Pershbaker, 73 Cal. 109; 14 Pac. Rep. 401; 15 Mor. Min. Rep. 602; Book v. Justice M. Co., 58 Fed. Rep. 106; Allen v. Dunlap, 24 Oreg. 229; 33 Pac. Rep. 675.

62. A location notice need not be posted on the vein. Phillpotts v. Blasdell, 8 Nev. 61; 4 Mor. Min. Rep. 341.

63. A location notice must be posted at the discovery point under the Colorado law. McCaig v. Bryan, 10 Colo. 309; 15 Pac. Rep. 413.

64. A location notice need not be posted at the precise point of discovery, but should be near it. Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

65. The mere posting of a location notice, without a discovery, confers no right. Eilers v. Boatman, 111 U. S. 356; 15 Mor. Min. Rep. 471. See 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462.

66. The Montana statutes require the notice of location to be posted at the discovery point. But the fact that no mineral was found at the point where the notice was posted does not invalidate the location if mineral has been discovered elsewhere on the

claim. O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302.

67. A locator who posts a notice on his claim has a reasonable time within which to mark the boundaries, and if he does this, he cuts out any adverse rights which were initiated between the dates of posting his notice and marking his claim. Doe v. Waterloo M. Co., 70 Fed. Rep. 455; Burke v. McDonald, 2 Idaho, 1022; 29 Pac. Rep. 98.

68. The discoverer of a vein has a reasonable time after posting his discovery notice within which to perfect his location, but he may not post location notices on numerous claims for the purpose of keeping off other prospectors, and then go back and perfect his locations at his leisure. Burke v. McDonald, 2 Idaho, 646; 33 Pac. Rep. 49.

69. The notice of location is required to be in writing, and to be posted conspicuously on the claim. A notice in writing folded and placed on a mound of rocks, with rocks nearly covering it, is a sufficient compliance with the law. Donahue v. Meister, 88 Cal. 121; 25 Pac. Rep. 1096.

70. The erection of a discovery stake and posting of a notice is sufficient to protect the discoverer's rights during the time allowed by the Colorado statutes for completing a location. Erhardt v. Boaro, 2 McCrary, 141; 1 Mor. Min. Rep. 452. See 113 U. S. 527; 4 Mor. Min. Rep. 432, to same effect.

71. After discovery and posting of notice giving the number of feet claimed along the lode on each side of the discovery, the discoverer is protected against subsequent locators during the period allowed by the Colorado law for perfecting a location. Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

72. After a lapse of several years it may be presumed in favor of one holding by purchase that the discovery notice was properly posted. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329; Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178.

73. A mere posting of notice at the discovery point, not followed by staking, is of no effect if an adverse right intervenes before the claim is marked. Newbill v. Thurston, 65 Cal. 419; 4 Pac. Rep. 409; Patterson v. Tarbell, 26 Oreg. 29; 37 Pac. Rep. 76.

74. The discoverer of a lode who posts a discovery notice has a reasonable time within which to mark the surface boundaries of his claim. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

75. A misdescription in the notice of the claimant to a quartz lead posted near the premises in pursuance of the requirements of the mining laws of the district in which the land is situated, and where the lead is under ground and undeveloped, will not vitiate the claim. Johnson v. Parks, 10 Cal. 446 (1858); 4 Mor. Min. Rep. 316.

76. The posting of a notice upon a tree at each end of a mining claim is not a sufficient compliance with section 2324, United States Revised Statutes, which requires the location to be "distinctly marked on the ground so that its boundaries can be readily traced." Holland v. Mt. Auburn G. Qtz. M. Co., 53 Cal. 149; 9 Mor. Min. Rep. 497.

77. A location notice posted on the claim and a record of location are different in their essential particulars. The posted notice is not required to be as specific as the record, which must describe the claim by reference to some natural object or permanent monument. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

78. A location notice placed in a tin can on a rock mound was held to be posted conspicuously. Gird v. California Oil Co., 60 Fed. Rep. 531.

79. The laws of the United States do not require a copy of the location notice to be posted on the claim, but it would be competent for the miners of the local mining district to make such a regulation, and, in case of such a regulation, it would be necessary to observe it (sec. 2324, U. S. Rev. Stat.). Com'r to John E. Elbert, Aug. 19, 1889, 16 C. L. O. 123.

80. Posting of a notice on a five-sided tract claimed for mining, and marking three of its corners, in the absence of any mining district rule, is not a valid or sufficient location. Hess v. Winder, 30 Cal. 349 (1865); 12 Mor. Min. Rep. 217.

81. "If one has discovered a lode, and set up a notice of his claim to it, and within the time fixed by law, for doing the work necessary to a valid location, another, coming to the same place and taking possession thereof to the exclusion of the first, shall not have

advantage of his own wrong; nor shall the subsequent locator be permitted to allege anything against the right of the first locator." Erhardt v. Boaro, 3 McCrary, 19; 2 Colo. Law Rep. 89; 4 Mor. Min. Rep. 434. (Affirmed by U. S. Supreme Court, 113 U. S. 527; 4 Mor. Min. Rep. 432.)

82. Where several persons post a notice of location on a mining claim and sign the same as locators, a subsequent notice posted on the same claim, signed by some of the original locators and by other persons whose names did not appear in the first notice, is an original notice so far as the new locators are concerned, but does not affect the rights of the prior locators whose names are omitted, nor operate as an abandonment of the first location by the persons whose names are signed to both notices; and in an action by all the persons whose names are signed to the notices to quiet their title as against an adverse claimant, the second notice is admissible in evidence. Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182.

83. "A mere posting of notice on a ridge of rocks cropping out of the earth, or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not itself initiate any right. There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence. Then protection will be afforded to the locator to make the necessary excavations and prepare the proper certificate for record. It would be difficult to lay down any rules by which to distinguish a speculative location from one made in good faith with a purpose to make excavations and ascertain the character of the lode or vein, so as to determine whether it will justify the expenditures required to extract the metal; but a jury from the vicinity of the claim will seldom err in their conclusions on the subject." Erhardt v. Boaro, 113 U. S. 527; 4 Mor. Min. Rep. 432.

84. "Hawk Lode. We, the undersigned, claim 1,500 feet on this mineral-bearing lode, vein or deposit. Dated June 17, 1880. Joel B. Erhardt, ½, Thomas Carroll, ½." *Held*, that this notice, posted at the point of discovery, would hold seven hundred and fifty feet each way along the vein until the ground could be prospected and a better location made. Erhardt v. Boaro, 113 U. S. 527; 4 Mor. Min. Rep. 432.

3. *Record.*

85. A location is a segregation of the land if duly recorded, and an agricultural entry should not thereafter be allowed for the land. Piru Oil Co., 16 L. D. 117.

86. The fact that the location notice was recorded before the notice was posted is immaterial. Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 523; 9 Mor. Min. Rep. 529;

87. A certified copy of location notice is proof only of performance of one of the four acts necessary to make a valid location — of the date of location,— and is a description of the ground located. Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 663.

88. Where the State statute gives a discoverer sixty days within which to perfect his location and to record notice thereof, if the location is perfected and notice recorded within the time allowed it dates back to date of discovery, and cuts out all intervening rights. Marshall v. Harney Peak T. M. M. & M. Co., 1 S. D. 350; 47 N. W. Rep. 290.

89. The record of a location certificate is presumptive evidence that a discovery was made as alleged therein. Cheesman v. Shreeve, 40 Fed. Rep. 787.

90. The location of a mining claim must be recorded before a survey thereof may be made. Com'r to Surveyor General of Nevada, 1 L. D. 581.

91. In the absence of proof or an allegation to the contrary, it is to be presumed that the locator of a mine complied with the law before recording his location. Juniper Mine (B), 4 C. L. O. 114.

92. A location notice is proper evidence in connection with a patent to show the claim to which the patent refers. Goller v. Fett, 30 Cal. 481; 11 Mor. Min. Rep. 171.

93. If all steps required by local rules and regulations have been taken such as is sufficient to impart notice to all, a locator's rights will not be affected by a mistake of the recorder, and such a mistake in the matter of

description may be remedied by parol testimony. Myers v. Spooner, 55 Cal. 257; 9 Mor. Min. Rep. 519.

94. The mistake of the recorder in recording a location certificate is not the fault of claimant, and cannot injure him. Weise v. Barker, 7 Colo. 178; 2 Pac. Rep. 919; 2 West Coast Rep. 108.

95. A location notice should be recorded in the office of the recorder of deeds if the claim is not situate within an organized mining district, in absence of a local statute. Rose Nos. 1 and 2 Lodes, 22 L. D. 83.

96. The defect in a mining claim caused by non-compliance with district regulations, in the matter of the width of the location, and record notice of such location, is cured by a formal annulment of said regulations prior to the allowance of the entry. Walter C. Childs, 10 L. D. 173.

97. There is no law requiring a description of the claim to be contained in the location notice. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

98. A location certificate, in itself fatally defective, may go to the jury in connection with a correct amended certificate. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

99. The words "dated on the ground" followed by a date, *held* to be the date of location in a location certificate. Preston v. Hunter, 67 Fed. Rep. 996.

100. Section 2324, United States Revised Statutes, governing the recording of mining claims, cannot be held to exclude parol proof of actual possession and the extent of that possession. Campbell v. Rankin, 99 U. S. 261; 12 Mor. Min. Rep. 257.

101. Location notices are not supposed to be technically exact or accurate, and must be liberally construed. Weill v. Lucerne M. Co., 11 Nev. 200; 3 Mor. Min. Rep. 372.

102. A mining claim, so far as the surface ground is concerned, must conform to the location notice and record thereof. City Rock Lode v. King of the West Lode, 1 C. L. O. 146.

103. The record of a location certificate is presumptive evidence of a valid location. Cheesman v. Hart, 42 Fed. Rep. 98.

104. Where, prior to the act of 1866, a record of location was required by the Idaho statute, but it was not required nor customary to insert in the record notice the number of feet claimed, a record of location, made under that law and custom, should not be excluded from evidence because of failure to show the number of feet claimed. Connor v. McPhee, 1 Mont. 73; 9 Mor. Min. Rep. 570.

105. All mines located prior to February 28, 1877 (date of opening the Sioux Indian reservation), in the Black Hills, Dakota, should be re-recorded. Com'r to John P. Jones, 4 C. L. O. 18.

106. The statutes of Montana requiring a record to be made of a vein mining claim cannot be construed to include placer claims. The record was therefore no part of evidence of title to a placer claim, and hence was inadmissible. Moxon v. Wilkinson, 2 Mont. 421; 12 Mor. Min. Rep. 602.

107. It is not the policy of the law to hold miners to accuracy in the record of locations, as, under the law, an absolutely correct certificate of location cannot be made without the aid of a surveyor, whose services it is generally impracticable to obtain. McEvoy v. Hyman, 25 Fed. Rep. 596; 15 Mor. Min. Rep. 397.

108. A location certificate, when recorded, is *prima facie* proof of what is therein stated, according to statutory provisions. Jantzen v. Arizona Copper Co., 20 Pac. Rep. 93; Flick v. Gold Hill & Lee Mtn. M. Co., 20 Pac. Rep. 807.

109. A change of location notice and of record thereof, by omitting one of the original names and inserting one in lieu thereof, does not invalidate the location. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

110. The failure on the part of a senior discoverer to record his location notice within the time prescribed by law will not validate an overlapping location based on a junior discovery, in the absence of a relocation of the conflict by the junior discoverer. Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

111. Where A. makes a location upon the ground, but fails to record his notice of location within the time prescribed by the Colorado statutes, and after the expiration of such time, and before the record of such location notice by A., B. makes a regular location and records a notice thereof as required by law, B. has the superior right. Kendall

v. San Juan S. M. Co., 144 U. S. 658. (Affirming 9 Colo. 349; 12 Pac. Rep. 198.)

112. In the absence of the requirement by State statute or miners' regulation the notice of location of a mining claim need not be recorded, as the United States laws make no such requirement. Haws v. Victoria Copper M. Co., 160 U. S. 303; Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182; Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; 9 Mor. Min. Rep. 513; Poujade v. Ryan, 21 Nev. 449; 33 Pac. Rep. 659; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Carter v. Bacigalupi, 23 Pac. Rep. 361; Allen v. Dunlap, 24 Oreg. 229; 33 Pac. Rep. 675; King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480; Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487; Harvey v. Ryan, 42 Cal. 626; Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 183; Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419; Moxon v. Wilkinson, 2 Mont. 421; 12 Mor. Min. Rep. 602; Upton v. Larkin, 5 Mont. 600; 6 Pac. Rep. 66. (See S. C., 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404.) Gamer v. Glenn, 8 Mont. 371; 20 Pac. Rep. 654; Freezer v. Sweeney, 8 Mont. 508; 21 Pac. Rep. 20; Quimby v. Boyd, 8 Colo. 194; 6 Pac. Rep. 462; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Fuller v. Harris, 29 Fed. Rep. 814. *Contra:* Section 2324, United States Revised Statutes, required a location notice to be recorded. Sweet v. Webber, 7 Colo. 443; 4 Pac. Rep. 752; 4 West Coast Rep. 116.

113. A failure to file a location certificate for record within the time prescribed by State statute does not render a location void, if the notice is recorded before the intervention of an adverse claim. Preston v. Hunter, 67 Fed. Rep. 996; Faxon v. Barnard, 3 McCrary, 44; 1 Colo. Law Rep. 147; 9 Mor. Min. Rep. 515; Kramer v. Settle, 1 Idaho, 485; 9 Mor. Min. Rep. 561.

114. A location certificate sworn to under the Montana statute, the date in the jurat of which is one year previous to the date of location as stated in the certificate, is inadmissible unless the discrepancy is explained. Berg v. Koegel, 16 Mont. 266; 40 Pac. Rep. 605.

115. All material facts in the location certificate must be sworn to under the Montana statutes to render the certificate admissible in evidence. McCowan v. Maclay, 16 Mont. 234; 40 Pac. Rep. 602.

116. An adverse complaint was held bad on demurrer wherein was set forth the location certificate and oath thereto, the oath not covering all material facts set forth in the location certificate. McCowan v. Maclay, 16 Mont. 234; 40 Pac. Rep. 602; O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302; 9 Mont. 452; 23 Pac. Rep. 1018.

117. The Montana statute requiring a location certificate to be under oath is constitutional. O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302; McCowan v. Maclay, 16 Mont. 234; 40 Pac. Rep. 602; Berg v. Koegel, 16 Mont. 266; 40 Pac. Rep. 605.

118. The requirement of the Montana statute, that a location notice of a quartz mine be under oath, was thought to be unconstitutional in Wenner v. McNulty (7 Mont. 30; 14 Pac. Rep. 643), or at least the authority of the legislature to make such a law was doubted; but the law was fully affirmed in O'Donnell v. Glenn (8 Mont. 248; 19 Pac. Rep. 302), and this ruling was followed as the law of the case in O'Donnell v. Glenn (9 Mont. 452; 23 Pac. Rep. 1018), and was also followed as *stare decisis* in Metcalf v. Prescott (10 Mont. 283; 25 Pac. Rep. 1037). McCowan v. Maclay, 16 Mont. 234; 40 Pac. Rep. 602.

119. A location notice without notarial evidence that the party making it took an oath is not good under the Montana statute. Metcalf v. Prescott, 10 Mont. 283; 25 Pac. Rep. 1037.

120. An objection to the introduction of a location certificate not under oath was properly sustained by the court under the Montana act of May 8, 1873. Russell v. Hoyt, 4 Mont. 412; McBurney v. Berry, 5 Mont. 300; 5 Pac. Rep. 867.

121. The court doubts the authority of the legislature to require the location certificate to be verified. Wenner v. McNulty, 7 Mont. 30; 14 Pac. Rep. 643. See, on this point, O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302.

122. The Montana statutes require a location certificate to be made under oath. Russell v. Hoyt, 4 Mont. 412; Mantle v. Noyes, 5 Mont. 274; 5 Pac. Rep. 856; S. C., 127 U. S. 348; 15 Mor. Min. Rep. 611; McBurney v. Berry, 5 Mont. 300; 5 Pac. Rep. 867; O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302;

9 Mont. 452; 23 Pac. Rep. 1018; Mattingly v. Lewisohn, 8 Mont. 259; 19 Pac. Rep. 310; 35 Pac. Rep. 111; Metcalf v. Prescott, 10 Mont. 283; 25 Pac. Rep. 1037. But the oath may be on information and belief. Wenner v. McNulty, 7 Mont. 30; 14 Pac. Rep. 643.

123. For what a location notice and record should contain, see sec. 2324, U. S. Rev. Stat.; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299: 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; 9 Mor. Min. Rep. 513; Faxon v. Barnard, 2 McCrary, 44; 4 Fed. Rep. 702; 1 Colo. Law Rep. 147; 9 Mor. Min. Rep. 515; Darger v. Lesieur, 8 Utah, 160; 30 Pac. Rep. 363. (Affirmed in 9 Utah, 192.)

124. For definitions of natural objects, within the meaning of section 2324, United States Revised Statutes, see Wade on Mining, 113; Quimby v. Boyd, 8 Colo. 194; 6 Pac. Rep. 462.

125. A location made under the act of May 10, 1872, must be accurately described in the notice thereof. Shoo Fly Lode v. Mono Lode, 1 C. L. O. 135.

126. If the location certificate contains some description of the claim by reference to natural objects or permanent monuments, the sufficiency of the description should be left to the jury. Taylor v. Middleton, 67 Cal. 656; 8 Pac. Rep. 594; 15 Mor. Min. Rep. 284; McGregor v. Donnelly, 67 Cal. 149; 7 Pac. Rep. 422; Russell v. Chumasero, 4 Mont. 309; 1 Pac. Rep. 713; 15 Mor. Min. Rep. 508; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 964; Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66; Flavin v. Mattingly, 8 Mont. 242; 19 Pac. Rep. 384; Gamer v. Glenn, 8 Mont. 371; 20 Pac. Rep. 654; Seider v. Lafave, 4 New Mex. 369; 20 Pac. Rep. 789; Seider v. Maxfield, 4 New Mex. 374; 20 Pac. Rep. 794. The last two cases discuss this point, and overrule Baxter Mtn. G. M. Co. v. Patterson, 3 New Mex. 179; 3 Pac. Rep. 741; 3 West Coast Rep. 77.

127. A notice of the location of a mining claim under the laws of the United States and the Territory of New Mexico, which does not describe the limits of the claim by reference to natural objects or permanent monuments, is not sufficient, although it describes the claim as bounded by certain other claims. Baxter Mtn. G. M. Co. v. Patterson, 3 New Mex. 179; 3 Pac. Rep. 741; 3 West Coast Rep. 77. *Contra*, McGregor v. Donnelly, 67 Cal. 149; 7 Pac. Rep. 422.

128. Natural objects or permanent monuments, under section 2324, United States Revised Statutes, may consist of stone monuments, blazed trees, confluence of streams, intersection of prominent buttes, of hills, or of mining shafts. Drummond v. Long, 9 Colo. 538; 13 Pac. Rep. 543; 15 Mor. Min. Rep. 510.

129. Where reference is made in the location certificate to stakes, the sufficiency of the notice should be left to a jury. O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302.

130. If a location certificate, invalid by error or insufficiency of description, is corrected by an amended certificate (under Colorado statute), the amendment relates back to the date of the original, so as to cut off intervening adverse rights. McEvoy v. Hyman, 25 Fed. Rep. 596; 15 Mor. Min. Rep. 397.

131. Previous to staking the claim it was described in the location notice as running fifteen hundred feet east and west. It was afterwards staked north and south, and the record changed. *Held*, in the absence of the intervention of a valid adverse claim that the change was not an invalidation of the location. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

132. A statement in the record of location that the claim "is situated on the north side of Iowa gulch, above timber line, on the west side of Bald Mountain," is not such a reference to a natural object as would render the record admissible in evidence. Faxon v. Barnard, 2 McCrary, 44; 4 Fed. Rep. 702; 1 Colo. Law Rep. 147; 9 Mor. Min. Rep. 515.

133. A location notice describing a claim as follows was held to be sufficient: "Commencing at a young black oak tree about 400 feet northerly of an old cross-cut or drift, in the ravine; thence running southeasterly 1500 feet to a black oak tree near a small ravine on the north side of Turnback creek." Carter v. Bacigalupi, 23 Pac. Rep. 361.

134. A location certificate describing the claim as being west of and adjoining a certain other mining claim, and also describing the claim located by metes and bounds, is *prima facie* sufficient in the matter of de-

scription of the claim. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

135. A location which, after naming the locators and their interests to the extent of one thousand feet, concluded as follows: "We claim 500 feet easterly and 500 feet westerly, situate about 200 feet easterly from Sacramento," is not void for uncertainty in the Ophir mining district, Utah, if the location was made prior to the act of May 10, 1872. Red Pine Lode, 1 C. L. O. 162.

136. The question as to whether or not an object described in a location notice is a permanent monument is a matter of proof and cannot be determined by the court from an inspection of the location notice. Metcalf v. Prescott, 10 Mont. 283; 25 Pac. Rep. 1037. (Citing Russell v. Chumasero, 4 Mont. 309; 1 Pac. Rep. 713; 15 Mor. Min. Rep. 508.) O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302; Dillon v. Bayliss, 11 Mont. 171; 27 Pac. Rep. 725.

137. What are or are not permanent objects or monuments are matters of proof, and cannot be decided by the court by simple reference to the location certificate. Russell v. Chumasero, 4 Mont. 309; 1 Pac. Rep. 713; 15 Mor. Min. Rep. 508.

138. A tree may be a natural object for the purpose of describing a mining claim in the location notice if susceptible of identification. Quimby v. Boyd, 8 Colo. 194; 6 Pac. Rep. 462.

139. The *record* of location, when required, must describe the claim by reference to a natural object or permanent monument; but this requirement does not apply to the location *notice*. Poujade v. Ryan, 21 Nev. 449; 33 Pac. Rep. 659; Brady v. Husby, 21 Nev. 453; 33 Pac. Rep. 801.

140. "The object of any notice at all being to guide a subsequent locator and afford him information as to the extent of the claim of the prior locator, whatever does this fairly and reasonably, should be held a good notice. Great injustice would follow, if, years after a miner had located a claim and taken possession and worked upon it in good faith, his notice of location were to be subjected to any very nice criticism." Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

141. The fact that two counties are given in the location certificate will not vitiate it, one being surplusage. Metcalf v. Prescott, 10 Mont. 283; 25 Pac. Rep. 1037.

142. A location notice need only give fairly and reasonably a description of the claim to guide subsequent locators. Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

143. If a location certificate contains some reference to stakes, other claims, etc., the sufficiency of description should be left to the jury. Dillon v. Bayliss, 11 Mont. 171; 27 Pac. Rep. 725.

144. The sufficiency of description in a location notice should be left to the jury if some attempt is made to describe the claim therein with reference to natural objects, monuments, stakes, etc. O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302; Brady v. Husby, 21 Nev. 453; 33 Pac. Rep. 801.

145. The question of sufficiency of a location record, where a natural object or permanent monument is referred to, is one for the jury. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

146. On the question of sufficiency of a location notice as to description, see Flavin v. Mattingly, 8 Mont. 242; 19 Pac. Rep. 384, and cases cited; O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302.

147. A location notice, defective in that it fails to describe the claim with particularity, may, if connected with the location of the claim by evidence, be admitted for the purpose of showing the date of the initiation of a mining claim in Alaska. Bennett v. Harkrader, 158 U. S. 441.

148. A location certificate must show the claim to be marked in some way to be admissible in evidence. Gilpin County M. Co. v. Drake, 8 Colo. 586; 9 Pac. Rep. 787.

149. A record of location notice which identifies a point of the claim by bearings to mountain peaks is *prima facie* sufficient, and is admissible in evidence, though it may be thereafter proven insufficient. Craig v. Thompson, 10 Colo. 517; 16 Pac. Rep. 24.

150. A record of location is not required by the United States laws, but if required by local law or regulation it must fix the *locus* of the claim by reference to natural objects or permanent monuments. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 15 Nev. 450; 12 Nev. 312; 1 Mor. Min. Rep. 120.

151. A record of a location notice which on its face is so indefinite in the matter of description as to render it impossible to identify the claim therefrom is inadmissible in evidence. Drummond v. Long, 9 Colo. 588; 13 Pac. Rep. 543; 15 Mor. Min. Rep. 510; Gilpin County M. Co. v. Drake, 8 Colo. 586; 9 Pac. Rep. 787; Faxon v. Barnard, 2 McCrary, 44; 1 Colo. Law Rep. 147; 9 Mor. Min. Rep. 515.

152. An original location notice is not supposed to contain a perfect description of the claim, and may be subsequently amended so as to describe the claim with more exactness. McEvoy v. Hyman, 25 Fed. Rep. 539; 15 Mor. Min. Rep. 300.

153. If, in the record of location, any reference is made to a natural object, as by stating that the claim is on a certain mountain, the record is admissible in evidence, its sufficiency being a question to be determined from the evidence. Brady v. Husby, 21 Nev. 453; 33 Pac. Rep. 801.

154. Where the location of a mining claim is made both by posting notices and by designating fixed objects, such as trees, shafts and ditches, on or near its exterior boundaries, in an action between two companies involving the title to a portion of the ground, witnesses are not confined in their testimony to a statement of the contents of the notices, but may also state whether the location made included the ground in dispute. Kelly v. Taylor, 23 Cal. 11 (1863).

155. A description in the record of a location notice to the effect that two mountain peaks bear in certain directions: that the claim is on a certain river near a named city; and that the shaft is on a certain small creek, at a place a certain distance from falls therein, is sufficient. Jackson v. Dines, 13 Colo. 90; 21 Pac. Rep. 918.

156. A location notice should contain a description of the ground located, and the same should be marked on the ground. Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645.

157. A permanent object to which reference must be made in the record of location may be a prominent post or stake, or a shaft. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

158. The fact that, instead of stakes called for in the record of location, trees were squared and marked is immaterial. Hansen v. Fletcher, 10 Utah, 266; 37 Pac. Rep. 480.

159. A record of a location notice which describes the claim by reference to rock monuments and stakes at the corners of the claim, and by reference to the prospect hole, is sufficient under the law in the matter of description. Hansen v. Fletcher, 10 Utah, 266; 37 Pac. Rep. 480.

160. A description of a claim in the location certificate by reference to blazed trees, rock monument or discovery shaft may be sufficient. Hansen v. Fletcher, 10 Utah, 266; 37 Pac. Rep. 480.

161. A location certificate containing some reference to natural objects or permanent monuments will be held sufficient in the absence of evidence to the contrary. Brady v. Husby, 21 Nev. 453; 33 Pac. Rep. 801; Hammer v. Garfield M. & M. Co., 130 U. S. 291.

162. A record of a location notice is admissible in evidence, if reference is made therein to the position of a neighboring claim, in the absence of objection. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

163. The requirements as to location notices and location records are different. The location notice is posted on the claim, and need not fix the *locus* of the claim by reference to natural objects or permanent monuments; but the record *must* so identify the claim, if required at all. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

164. "The purpose of the notice (record) is to direct the inquirer to the place where the claim is located, and not to show its precise boundaries as marked upon the ground. It must contain enough, taken with these boundaries, to enable a person of reasonable intelligence to find the claim and trace its boundaries." Gamer v. Glenn, 8 Mont. 371; 20 Pac. Rep. 654.

165. The statement that a mining claim is "situated about fifteen hundred feet N. W. by N. of the Mountain Pride lode," in a location record, is, in the absence of a showing to the contrary, a sufficient description of the *locus* of the claim. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 439.

166. An error in a location notice in a particular not essential under the law, regulations or customs of miners is harmless and

does not vitiate a description otherwise good. Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153. (See 130 U. S. 291.) Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66; Flavin v. Mattingly, 8 Mont. 242; 19 Pac. Rep. 384; Gamer v. Glenn, 8 Mont. 371; 20 Pac. Rep. 654; Metcalf v. Prescott, 10 Mont. 283; 25 Pac. Rep. 1037.

167. Slight errors in a location certificate do not render it invalid or inadmissible in evidence. Gamer v. Glenn, 8 Mont. 371; 20 Pac. Rep. 654.

168. A notice of location which describes the claim by metes and bounds and as so many feet south from a well-known quartz location is sufficient under the law as to description. Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153. See 130 U. S. 291.

169. A location certificate so obviously indefinite in the matter of description as to be useless for the purpose of identifying the claim is inadmissible in evidence. Gilpin County M. Co. v. Drake, 8 Colo. 586; 9 Pac. Rep. 787.

170. A claim was described in the location certificate as follows: "Beginning at the westerly end of the Gilpin County Mining Company's property, on the Williams lode, in Lake Gulch Mining District; runs thence in a westerly direction a distance of fifty feet to the easterly end of Packard and Updegraph's property on said lode." This description was held to be insufficient, and the location certificate inadmissible, though the other claims mentioned were patented ones. Gilpin County M. Co. v. Drake, 8 Colo. 586; 9 Pac. Rep. 787.

171. Technical accuracy of description is not required in a location notice. Book v. Justice M. Co., 58 Fed. Rep. 106.

172. A reference in a location notice to the position of an adjoining patented mining claim is a sufficient reference to a permanent monument under section 2324, United States Revised Statutes. Book v. Justice M. Co., 58 Fed. Rep. 106.

173. A reference in the record of a location certificate to an adjoining mining claim as "the Gambetta lode claim on the east" is such a reference to a permanent monument as to render the record admissible in evidence; the sufficiency of the description being a question for the jury. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

174. It is not for the court to say by mere inspection of the record of the location notice what are or what are not natural objects or permanent monuments within the meaning of the law. That is a matter of proof. A reference to adjoining claims may be shown to sufficiently fix the *locus* of the claim located. Russell v. Chumasero, 4 Mont. 309; 1 Pac. Rep. 713; 15 Mor. Min. Rep. 508.

175. Under section 2324, United States Revised Statutes, requiring that a location record of a mining claim shall contain such description of the claim located by reference to some natural object or permanent monument as will identify the claim, parol evidence is admissible to show that a natural object or monument referred to in the location, but not designated therein as a permanent object, is in fact permanent. Seider v. Lafave, 4 New Mex. 369; 20 Pac. Rep. 789; Seider v. Maxfield, 4 New Mex. 374; 20 Pac. Rep. 794. (Overruling Baxter Mtn. G. M. Co. v. Patterson, 3 New Mex. 179; 3 Pac. Rep. 741; 3 West Coast Rep. 77.)

176. An original location notice, invalid because of insufficiency of description, is admissible in connection with an amended certificate, made before the intervention of valid adverse rights. Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 663.

177. If an original and an amended location certificate, taken together, give a sufficient description of the claim, they are admissible in evidence. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

178. A reference in a location certificate to the discovery cut and the stakes of the claim located is not such reference to permanent monuments as to render the record admissible in evidence. McEvoy v. Hyman, 25 Fed. Rep. 596; 15 Mor. Min. Rep. 397.

179. A statement in the record of location that the claim (described as containing a certain number of feet each way from the discovery shaft, with surface ground of certain width) is situated "on the southwest side of Mount Hardin, in Portland Gulch, about 1500 feet north of the Hawkeye lode," is not a sufficient description of the *locus* of the claim to render the record admissible in

evidence. Drummond v. Long, 9 Colo. 538; 13 Pac. Rep. 543; 15 Mor. Min. Rep. 510.

180. A deed not giving boundaries, but referring to a location certificate in which a full description is given, will extend the possession to the entire claim described in such location certificate. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178.

181. The finding that a location notice was sufficient and the boundaries properly staked is a finding of facts. Eilers v. Boatman, 111 U. S. 356; 15 Mor. Min. Rep. 471; S. C., 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462.

182. Whether or not a location notice contains a sufficient description of the claim by reference to natural objects and permanent monuments is a question of fact. Eilers v. Boatman, 111 U. S. 356; 15 Mor. Min. Rep. 471; S. C., 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462.

183. A location notice describing the claim by a wrong legal subdivision is nevertheless good if from the other description given the land may be clearly identified. Duryea v. Boucher, 67 Cal. 141; 7 Pac. Rep. 421.

184. A. makes a discovery and posts his notice. B. then does the same. Within the time allowed each makes a location, defective in that sufficient description of the claim is not given in the certificates. B. makes and files a correct amended notice, and A. subsequently does the same. *Held*, that A. has the better right. Craig v. Thompson, 10 Colo. 517; 16 Pac. Rep. 24.

185. A natural object or permanent monument necessary to be referred to in a record of location may or may not be on the ground located and may consist of a prominent stake or post or of a shaft. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

186. A location certificate is inadmissible in evidence when it is obvious from a reading of it that there could be no certain description therein of the claim located. Darger v. Lesieur, 8 Utah, 160; 30 Pac. Rep. 363. (Affirmed in 9 Utah, 192.)

187. In the absence of a local statutory requirement, a location notice recorded need not be a copy of the notice posted on the claim, as the United States law does not require any notice to be posted on the claim. Gird v. California Oil Co., 60 Fed. Rep. 531.

188. A location record which describes the claim as bounded by four other claims and marked by monuments at the corners is *prima facie* sufficient in matter of description. Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; 9 Mor. Min. Rep. 513.

189. A location notice is not of itself evidence of legal possession, but is evidence of one step taken to acquire such possession. Thompson v. Lee, 8 Cal. 276; 1 Mor. Min. Rep. 610.

4. *Relocation.*

190. A mining claim may be relocated if either forfeited or abandoned. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; Kramer v. Settle, 1 Idaho, 485; 9 Mor. Min. Rep. 561; De Puy v. Williams, 26 Cal. 310; 5 Mor. Min. Rep. 251.

191. Where a mining claim has been relocated for abandonment the relocator may not, in applying for patent, have the improvements made by the original locator considered as having been made by himself or his grantors. Andrew M. Embry, 7 C. L. O. 5.

192. In contested mining claims the question of abandonment is one of fact, and a hearing should be had in order to decide the question. France, Pontez & Co. v. Harrison, 5 C. L. O. 66.

193. A resumption of work prior to relocation defeats forfeiture. Gonu v. Russell, 3 Mont. 358; 12 Mor. Min. Rep. 630; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Anderson v. Byam, 8 L. D. 388.

194. A location based upon a discovery made within the limits of another existing and valid location is illegal. The rule is otherwise where the first locators fail to comply with the law within the statutory period prior to the last location. Branagan v. Dulaney, 2 L. D. 744.

195. One who sells to another a locator's possessory right to a mining claim may not afterward relocate the land because of the invalidity of the first location, though he will not be estopped from relocating the ground if the claim is abandoned by the grantee. Forbes v. Gracey, 94 U. S. 762; 14

Mor. Min. Rep. 183; Blake v. Thorne, 16 Pac. Rep. 270.

196. An abandonment does not occur where the annual work is done for the benefit of the locator. Diamond Creek G. & S. M. Co. v. Lloyd, 9 C. L. O. 54.

197. A mining claim cannot be relocated until the first location is forfeited. Seymour v. Wood, 4 C. L. O. 82.

198. Assessment work is not done on a claim, though one owner promises to see that it is done. A third person, in collusion with the owner by whose fault abandonment occurred, relocates and applies for patent. The other owner in the original location adverses. *Held*, that he has no grounds for adversing, but should file a bill in equity against the applicant to have him declared a trustee. Doherty v. Morris, 11 Colo. 12; 16 Pac. Rep. 911.

199. Relocation can only be made where there has been a prior legal location. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510. See 3 Mont. 65.

200. A party making annual expenditures on one of two claims held in common, for the benefit of the claim involved, is not bound to prove record title to the location on which work was done, having shown possession. De Noon v. Morrison, 88 Cal. 163; 23 Pac. Rep. 374.

201. In case of a relocated mine in dispute, a hearing should be ordered to determine all the facts as to the relocation, abandonment, etc. Albert B. Corey, 5 C. L. O. 52.

202. After failure to do work for any full year, he who first locates the ground after the expiration of the year has the better title thereto. Belk v. Meagher, 3 Mont. 65. See 104 U. S. 279; 1 Mor. Min. Rep. 510.

203. An adverse relocation made during the pendency of an order holding the original claim for cancellation gives the relocator no standing to be heard as against the right of the claimant. Smuggler M. Co. v. Trueworthy Lode, 19 L. D. 356.

204. After application for patent and publication of notice thereof, and before entry, a claim may be relocated for abandonment, and the application will be canceled if no adverse claim or suit based on an adverse claim is pending against said application. Continental G. & S. M. Co. v. Gage, 10 L. D. 534.

205. Failure to perform annual expenditure upon a claim up to the date of entry will subject the claim to relocation even after application for patent and publication of notice thereof. Sweeney v. Wilson, 10 L. D. 157.

206. A tortious entry is unavailing for the purpose of a valid location of a mining claim. A relocator cannot avail himself of mineral in the public lands until the discoverer has in law abandoned his claim and left the property open for another to take up. No matter how derelict a claimant may have been, if he has returned and is working on his claim, it is not subject to relocation. McNeil v. Pace, 8 L. D. 267.

207. An expenditure of $500 must be made by the applicants for patent or their *grantors* in case of a relocated mine. Com'r to William A. Arnold, Jan. 30, 1875, 1 C. L. O. 179.

208. A location can only be made where the law allows it to be done. Hence, a relocation on lands actually covered at the time by another valid and subsisting location is void, not only against the prior locator, but all the world. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65.

209. A location of land embraced in a prior valid subsisting location is void. Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7. (See 114 U. S. 576.) Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 668; Garthe v. Hart, 78 Cal. 541; 15 Pac. Rep. 93; 15 Mor. Min. Rep. 492; Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581.

210. A relocation of a mining claim for abandonment, before the time for doing the annual work has expired, is void. Hall v. Hale, 8 Colo. 351; 8 Pac. Rep. 580.

211. A mining claim is not subject to relocation subsequent to entry. American Hill Quartz Mine, 5 C. L. O. 114.

212. Where, in the location certificate of a mining claim of which entry has been made, it is stated that the location is upon an abandoned claim, the entryman is not required to furnish evidence of such abandonment, as the owner of the claim alleged to be abandoned loses his rights by failure to file an adverse claim. Manhattan & San Juan S. M. Co., 2 L. D. 698.

213. Lode claims located prior to May 10, 1872, upon which the required expenditure

has been made since May 10, 1872, and prior to January 1, 1875, are not subject to relocation at the latter date. Com'r to J. B. Chaffee, Dec. 2, 1874, 1 C. L. O. 138.

214. Where an applicant bases his right to a patent on a relocation, in the making of which he acted as a constructive trustee for the benefit of his co-owners according to their respective interests in the original location, such co-owners are not obliged to adverse the application, but may have the applicant declared trustee. Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816.

215. Where a claim has been abandoned after publication of notice of application for patent therefor and then relocated by a stranger, and subsequently the applicant makes entry and secures a patent, he will be declared to hold title under such patent as trustee for the relocator. (Strong dissenting opinion.) South End M. Co. v. Tinney, 35 Pac. Rep. 89.

216. An agent may not defeat the rights of his principal by a relocation, and if he attempts so to do he will be declared trustee under the relocation for his principal. Lockhart v. Rollins, 2 Idaho, 503; 21 Pac. Rep. 413.

217. A relocation by the agent of a claimant for himself questioned. Utah M. & Mfg. Co. v. Dickert & Myers Sulphur Co., 6 Utah, 188; 21 Pac. Rep. 1002.

218. If a location made by several persons is abandoned, a relocation may be made by some of the original locators associated with strangers. Strang v. Ryan, 46 Cal. 33; 1 Mor. Min. Rep. 48.

219. The owners of a mining claim holding by possessory right may not, after mortgaging the same, *abandon* the claim and allow it to be relocated and thereby defeat the mortgage. (In this case, however, though there was an attempted *abandonment*, there was no forfeiture, as annual labor was performed by the mortgagors during the year of relocation.) Alexander v. Sherman, 16 Pac. Rep. 45; 15 Mor. Min. Rep. 638. See Saunders v. Mackey, 5 Mont. 523; 6 Pac. Rep. 361.

220. A. enters into a contract with B., his co-tenant, who promises to do the annual assessment work. A.'s interest is forfeited if the work is not done within the prescribed time, and the claim becomes subject to relocation, and a valid relocation may be made by B. A.'s remedy is an action for breach of contract, or to establish and enforce a trust in the claim as relocated. Saunders v. Mackey, 5 Mont. 523; 6 Pac. Rep. 361.

221. A canceled mineral entry will not be reinstated by the General Land Office if the claim has been relocated after cancellation of the entry and before application for reinstatement. Com'r to Las Cruces Office, June 4, 1896, *In re* Juniata Lode; Com'r to Leadville Office, June 19, 1896, *In re* Quartzite Lode.

222. A mineral entry canceled without proper notice to the entryman will be reinstated notwithstanding the intervention of an adverse claim by relocation of the ground after the cancellation. McGowan v. Alps Cons. M. Co., 23 L. D. 113.

223. When several adjoining mining claims are held in common, work for the benefit of all, done upon any one or more of them, in a given year, to the total amount required to be done upon all if worked separately, will preserve the group of claims from relocation, under section 2324, United States Revised Statutes. Chambers v. Harrington, 111 U. S. 350. (Following and quoting from Jackson v. Roby, 109 U. S. 440.)

224. After a legal abandonment of a claim by failure to perform annual labor, it is the *entry* by a relocator, not mere lapse of time, that destroys the right of the original owner. Little Gunnell M. Co. v. Kimber, 1 Mor. Min. Rep. 536.

225. The laws and customs which point out the manner of locating mining claims are conditions precedent to the right to possess and mine a claim, and no such right can be acquired until such conditions precedent have been complied with. The requirements as to performance of annual labor, however, are conditions subsequent, the mere breach of which is not *per se* sufficient to cause a forfeiture, which must result from entry by the grantor (United States) or one claiming under it, *i. e.*, a relocation of the claim under the mineral land laws. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

226. Where a protest by a prior applicant is filed against an entry based upon a relocation, and it is alleged by the protestant that the claim was not subject to relocation, a hearing may be had to determine the truth of such allegation, as well as the countercharge that the right of the protestant under his application had been finally excluded by

adverse proceedings prior to said relocation. Continental G. & S. M. Co. v. Gage, 10 L. D. 534.

227. Annual labor may be performed at any time during the year, and a relocator before the expiration of the year is a mere trespasser. Atkins v. Hendree, 1 Idaho, 95; 2 Mor. Min. Rep. 328; Mills v. Fletcher, 100 Cal. 143; 34 Pac. Rep. 637.

228. A relocation made at 1 A. M. January 1, questioned, but not passed upon. Pharis v. Muldoon, 75 Cal. 284; 17 Pac. Rep. 70.

229. The resumption of work on an abandoned claim before relocation thereof will prevent forfeiture. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Lakin v. Sierra Buttes G. M. Co., 11 Sawy. 231; 25 Fed. Rep. 337; Belcher Cons. G. M. Co. v. Defferrari, 62 Cal. 163; Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341; Pharis v. Muldoon, 75 Cal. 284; 17 Pac. Rep. 70; McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329; Lacey v. Woodward, 25 Pac. Rep. 785.

230. The resumption of work upon a mining claim before the relocation, for the purpose of preventing a forfeiture as prescribed by section 2324, United States Revised Statutes, cannot be held to have been prosecuted with due diligence where it appeared that fifteen days prior to relocation all work thereon had ceased. Hirschler v. McKendricks, 16 Mont. 211; 40 Pac. Rep. 290.

231. A location on which annual expenditure in labor or improvements is not made as required by law may be relocated if work has not been resumed. Russell v. Brosseau, 65 Cal. 605; 4 Pac. Rep. 643; Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341; Morgan v. Tillottson, 78 Cal. 520; 15 Pac. Rep. 88.

232. Where a mining claim has become subject to relocation, the resumption of work thereon by the original locator, after a notice of relocation has been posted thereon but before the relocator has marked the boundaries of his relocation, is sufficient under section 2324, United States Revised Statutes, to prevent the original location from becoming forfeited. Pharis v. Muldoon, 75 Cal. 284; 17 Pac. Rep. 70; Gonu v. Russell, 3 Mont. 358; 12 Mor. Min. Rep. 630.

233. The resumption of work on a claim subject to relocation must be *bona fide*, not merely formal. McCormick v. Baldwin, 104 Cal. 227; 37 Pac. Rep. 903. (Overruling Belcher Cons. G. M. Co. v. Defferrari, 62 Cal. 160.)

234. Work may not be resumed by the original locators after relocation of the claim for abandonment. Slavonian M. Co. v. Vacavich, 7 Sawy. 217; 7 Fed. Rep. 331.

235. A relocator cannot avail himself of mineral in the public lands which another has discovered until the discoverer has, in law, abandoned his claim and left the property open for another to take up. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65.

236. A relocation made improperly or before the former location lapsed is not effective at or after the lapsing or forfeiture. Another relocation is necessary to secure any rights. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65.

237. A relocator of an abandoned claim may base the relocation on a discovery of mineral already made by the original locator, and may adopt the original markings of the claim. But in Colorado he must perform ten feet of development work. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed in 6 Colo. 581; 15 Mor. Min. Rep. 458.)

238. After the cancellation of a mineral entry the land becomes public land, and may be relocated by any qualified party. Ophelia Pope Lowe, 9 C. L. O. 192.

239. *Contra:* The cancellation of a mineral entry does not in itself render the ground subject to relocation, as the cancellation has no effect on claimant's possessory right. McGowan v. Alps Cons. M. Co., 23 L. D. 113.

240. A relocation of a mining claim is an implied admission of the validity of the original location, and an assertion that the relocator claims a forfeiture by reason of a failure on the part of the original locator to make his annual expenditure. Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795.

241. A relocation may be made by the owner of an abandoned claim just as by a stranger. Warnock v. De Witt, 11 Utah, 324;

40 Pac. Rep. 205; Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816; Com'r to Max Boehmer, March 15, 1881; Copp's Min. Lands, 2d ed., 300.

242. Where a claim has been applied for and subsequently forfeited, a relocator who desires to apply for a patent should secure the cancellation of the existing application by Land Department. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292; Andrew J. Gibson, 21 L. D. 219.

243. Where the defendant in an adverse suit relies upon a relocation of plaintiff's claim after forfeiture thereof, he is not obliged to plead such forfeiture specially. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

244. The failure of a prior locator to adverse the application for patent of a subsequent locator is a waiver of priority. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

245. An attempted relocation of a claim before the expiration of the time for performing the annual labor is a nullity, and cannot be validated by the fact that within such time no work was done by original owners. Slavonian M. Co. v. Vacavich, 7 Sawy. 217; 7 Fed. Rep. 331.

246. The boundaries of relocation cannot be changed to interfere with intervening rights. Pollard v. Shively, 5 Colo. 309; 2 Mor. Min. Rep. 229.

247. Mere occupancy of a mining claim on which the required annual expenditure has not been made will not prevent relocation of the claim. Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341.

248. An applicant for a mineral patent who, while a co-owner under the original location, relocated a mine in his own name, as single proprietor, is not obliged to show title back of such relocation; but if the proceedings are otherwise regular and his former co-owner and other parties fail to assert an adverse claim, patent may issue in the applicant's name. Gold Dirt Lode, 10 C. L. O. 119.

249. Expenditures made on abandoned mines do not inure to the benefit of relocators. Andrew M. Embry, 7 C. L. O. 5.

250. A hearing may be ordered by the Land Department to determine the question of abandonment. Empire G. & S. M. Co. and Crescent M. Co., 5 C. L. O. 50.

251. In an action to quiet title to a mining claim, where plaintiff sought to prove the performance of annual labor before defendant's relocation, a finding of the jury under defendant's testimony that the value of such work was less than $100 will not be disturbed on appeal, where plaintiff barely proved the performance of the required work, if at all, under the best view of his testimony. Hirschler v. McKendricks, 16 Mont. 211; 40 Pac. Rep. 290.

252. Upon the issue of forfeiture of a mining claim, the conduct and interest of those who claim by relocation after such alleged forfeiture may be considered in weighing the testimony. Doherty v. Morris, 17 Colo. 105; 28 Pac. Rep. 85.

253. Where a legal location is proved, the burden of proving forfeiture thereof is upon the one claiming under an adverse relocation. Hammer v. Garfield M. & M. Co., 130 U. S. 291; Quigley v. Gillett, 101 Cal. 462; 35 Pac. Rep. 1040.

254. Relocators of abandoned claims may continue work on the old shafts, tunnels, etc., or commence new ones. Com'r to L. E. Morgan, June 2, 1876, 3 C. L. O. 50.

255. An adverse locator must show abandonment of a prior location affirmatively. Coleman v. Curtis, 12 Mont. 301; 30 Pac. Rep. 266.

256. The grantor of a mining claim who has relocated it as abandoned property after his conveyance may not enforce payment of purchase price. Drake v. Gilpin County M. Co., 16 Colo. 231.

257. The owner of a placer mining claim does not forfeit his right thereto, so as to render it subject to relocation, by a failure to perform the annual assessment work during a time when adverse possession is held by another, where he commences action for its recovery within the statutory time. Trevaskis v. Peard, 44 Pac. Rep. 246 (Cal.).

258. One claiming by relocation after forfeiture must prove such forfeiture. Johnson v. Young, 18 Colo. 625; 34 Pac. Rep. 173; McNeil v. Pace, 3 L. D. 267.

259. After the termination of mining partnership, during which defective locations were made, one of the former partners may make a relocation for his own use. Page v.

Summers, 70 Cal. 121; 12 Pac. Rep. 120; 15 Mor. Min. Rep. 617.

260. One claiming by relocation must first introduce evidence going to show abandonment before he will be allowed to prove relocation. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

261. A valid location cannot be based upon a discovery made within the limits of a prior subsisting location. It must be made upon the unoccupied and unappropriated public domain; and the mere fact that the prior locator does not object is immaterial unless he abandons the ground in conflict. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

262. "Where a miner gives up his claim and goes away from it, without any intention of repossessing it, and regardless of what may become of it, or who may appropriate it, an abandonment takes place and the property reverts to its original *status* as part of the unoccupied public domain and is open to location by the first comer." Derry v. Ross, 5 Colo. 295; 1 Mor. Min. Rep. 1; Richardson v. McNulty, 24 Cal. 339; 1 Mor. Min. Rep. 11.

263. The owner of a mining claim may relocate it under a different name. Phillpotts v. Blasdell, 8 Nev. 61; 4 Mor. Min. Rep. 341.

264. A relocator has the same time for completing a relocation as does an original locator. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.) Pelican and Dives M. Co. v. Snodgrass, 9 Colo. 339; 12 Pac. Rep. 206.

265. One whose title is declared bad under one mining location may relocate the claim and base his title on such relocation. Meyendorf v. Frohner, 3 Mont. 282; 5 Mor. Min. Rep. 559.

266. A relocator of an abandoned claim, under the Colorado statutes, must either sink the discovery shaft ten feet deeper or make a new opening of the required depth and length. Little Gunnell M. Co. v. Kimber, 1 Mor. Min. Rep. 536.

267. Land covered by a subsisting mineral entry is not subject to relocation. F. P. Harrison, 2 L. D. 767; Good Return M. Co., 4 L. D., 221: Smugler M. Co. v. Trueworthy Lode, 19 L. D. 356.

268. A relocation made on a holiday, during the temporary absence of the claimants, confers no rights under the Colorado statutes. McNeil v. Pace, 3 L. D. 267.

269. Annual expenditure must be made on a mining claim up to the date of entry to prevent the relocation thereof for forfeiture, and the fact that large expenditures have been made will not prevent relocation, even though the applicant thought he had made entry. Ferguson v. Belvoir M. & M. Co., 14 L. D. 43.

270. A locator of a mining claim who has allowed his location to lapse for failure to do the annual assessment work, and to become subject to relocation under section 2324, United States Revised Statutes, providing for the relocation of claims on which the required annual amount of work has not been done, has the right to make a new location covering the same ground. Warnock v. De Witt, 11 Utah, 324; 40 Pac. Rep. 205.

271. The failure to perform the work in a mining claim required by law amounts to an abandonment of the claim, and thereupon it may be occupied by another. Kramer v. Settle, 1 Idaho, 485; 9 Mor. Min. Rep. 561.

272. The patenting of the discovery shaft of the first locator to a subsequent locator of a conflicting claim leaves the first claim subject to relocation. Miller v. Girard, 33 Pac. Rep. 69.

273. The failure of an applicant to perform annual labor on his claim between the dates of application for patent and of entry will subject the claim to relocation. McNeil v. Pace, 3 L. D. 267.

274. Failure to perform annual labor on the senior of two conflicting locations during the calendar year does not operate to vest title to the land in conflict in the owner of the junior location, who can secure the same only by a relocation made before the resumption of work by the senior locator. Oscamp v. Crystal River M. Co., 19 U. S. App. 18; 58 Fed. Rep. 293.

275. The title of a successful plaintiff in an adverse suit is a possessory one and may be lost by failure to make the required expenditure, followed by relocation by a third person. Com'r to Leadville Office, Feb. 24, 1896, *In re* Kennedy v. Johnston.

276. Where, after publication of notice of application for patent and before entry, a mining claim is relocated by a stranger for failure on part of the applicant to make the

required annual expenditure, and such failure and relocation are shown at a hearing, the entry will be canceled and the parties left to litigate their conflicting claims in court. The Land Department will not pass upon the validity of the relocation in such a case. Little Pauline Lode v. Leadville Lode, 7 L. D. 506.

277. Actual possession is not required to entitle a person holding under a location to bring suit under section 2326, United States Revised Statutes. Burke v. McDonald, 2 Idaho, 310; 13 Pac. Rep. 351; 2 Idaho, 1022; 29 Pac. Rep. 98; 2 Idaho, 646; 33 Pac. Rep. 49.

5. *General.*

278. For definition of a mining claim and location, see St. Louis Smelting Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Territory v. Mackey, 8 Mont. 168; 19 Pac. Rep. 395.

279. The term "mining claim" is used by miners as synonymous with "location." McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076.

280. A mining "claim," as the word is used in the mining laws, may mean a single location or a consolidation of several locations. S. F. Mackie, 5 L. D. 199.

281. A mining claim is a located piece of ground including the vein; but it is not the *vein* alone, under the act of 1872. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

282. A location is made of the vein. Johnson v. Parks, 10 Cal. 446; 4 Mor. Min. Rep. 316 (1858).

283. It is well settled that the rights of the miner to the surface ground of his location are dependent upon his discovery, and upon the relation which the vein, in its course and direction, bears to the surface as it has been located. The grant of the vein has always been held to be the principal thing, and the surface but an incident, which, as to its extent, is entirely determined by the course of the principal thing granted, to wit, the vein. Colorado Midland Ry. Co. v. Croman, 16 Colo. 381; Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542; Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

284. A lode is not known to exist until it has been located according to law and its boundaries marked on the surface. Duffy Quartz Mine, 18 L. D. 259.

285. Four things are necessary under the Colorado statutes to constitute a valid location: 1. Discovery shaft, ten feet deep from the rim. 2. Discovery notice posted at point of discovery. 3. Marking of claim. 4. Making and filing a location certificate. Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 663; Craig v. Thompson, 10 Colo. 517; 16 Pac. Rep. 24; Cheesman v. Shreeve, 40 Fed. Rep. 787.

286. The difference between a location and a mining claim is that a location is the appropriation according to law of a parcel of mineral-bearing land, while a claim comprises one or more locations. Poire v. Wells, 6 Colo. 406.

287. The locator of a mining claim need not purchase from the United States until he so wishes. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183; United States v. Nelson, 5 Sawy. 68; 14 Mor. Min. Rep. 381; Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

288. A party in possession is not compelled to purchase mining land from the government; and if he complies with the laws necessary to maintain a possessory right, his title is as good for all practical purposes as if secured by patent. F. P. Harrison, 2 L. D. 767.

289. A mining claim is known to exist when located. Mantle v. Noyes, 5 Mont. 274; 5 Pac. Rep. 856. See 127 U. S. 348; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574.

290. The question of whether a location should be made as a lode or a placer claim depends upon the geological formation of the deposit, and is one for the locator to decide. Com'r to A. T. Butler, June 13, 1892.

291. "A mining claim is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining laws, local and statutory. It must under the law of Congress of 1872 (Rev. Stat., § 2320), be located upon at least one known vein or lode, but the vein or lode is not the whole claim." Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

292. A mining claim may include one of several locations. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

293. A location is the act of appropriating mineral lands according to established

rules. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

294. Under the law of 1872, a mining claim is a piece of land as distinguished from a lode of which the location is made. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

295. Possession, and right and power to purchase, are inseparable. Tibbits v. Ah Tong, 4 Mont. 536.

296. "The Land Department of the government and this court also, have always acted upon the rule that all mineral locations were to be governed by the local rules and customs in force at the time of the location, when such location was made prior to the passage of any mineral law by Congress." Glacier Mtn. S. M. Co. v. Willis, 127 U. S. 471. (Citing Jennison v. Kirk, 98 U. S. 453; Broder v. Natoma Water & M. Co., 101 U. S. 274; Jackson v. Roby, 109 U. S. 440; Chambers v. Harrington, 111 U. S. 350.)

297. Locators are not bound by the terms of a prior location in which they allege no interest. Good Return M. Co., 4 L. D. 225; Com'r to L. Bradford Prince, Dec. 14, 1893.

298. Parol evidence is admissible to define what tract is embraced in a location. Prince of Wales Lode, 2 C. L. O. 2. (Citing Kelley v. Taylor, 23 Cal. 14.)

299. The possession of a mining claim must be based on a location thereof. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65; Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287; Sweet v. Webber, 7 Colo. 443; 4 Pac. Rep. 752; 4 West Coast Rep. 116; Patterson v. Tarbell, 26 Oreg. 29; 37 Pac. Rep. 76.

300. A location made on Sunday is not void if not prohibited by local law. Richmond M. Co. v. Rose, 114 U. S. 576; Departmental decision of July 17, 1879, *In re* Dolly Varden Lode; Com'r to F. Cunningham, March 29, 1880.

301. The locators of a vein or lode may not amend their location because of a change in the course of the vein located so as to interfere with the vested rights of another locator. O'Reilly v. Campbell, 116 U. S. 418.

302. A relocation taking in more land than the original location is not an amended location which will relate back to the date of the original location. Cheesman v. Shreeve, 40 Fed. Rep. 787.

303. An amended location certificate, if made before the intervention of adverse rights, will revert to the date of the first location, so as to remedy any defects therein. Craig v. Thompson, 10 Colo. 517; 16 Pac. Rep. 24.

304. A location may not be amended to the injury of intervening adverse rights. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 15 Nev. 450; 12 Nev. 312; 1 Mor. Min. Rep. 120; Wight v. Tabor, 2 L. D. 788.

305. An amended location certificate relates back to the original location in the absence of intervening adverse rights, as does also the sinking of a discovery shaft. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

306. Where an original certificate is subject to amendment, a certificate amendatory thereof will relate back to the date of the original certificate. Moyle v. Bullene, 44 Pac. Rep. 69 (Colo.).

307. An amended location may not be so made as to change the original location to cut off intervening adverse rights. Hall v. Arnot, 80 Cal. 348; 22 Pac. Rep. 200–203; Pelican & Dives M. Co. v. Snodgrass, 9 Colo. 339; 12 Pac. Rep. 206.

308. An amended location may enlarge the original if no one is injured thereby. Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240.

309. Where an original location certificate of a mining claim is void, a subsequent certificate cannot, as amendatory thereof, relate back to the date of the original certificate. Moyle v. Bullene, 44 Pac. Rep. 69 (Colo.).

310. A location which is separated along the line of the lode by a patented location made on a parallel lode is invalid as to one of the non-contiguous portions of the lode, as all parallel lodes embraced in the patented claim passed under the patent therefor. Col. Hall Lode (Keanage M. Griffin), 2 L. D. 735, 736.

311. An averment in pleading that land is vacant public land, and that a location notice was posted thereon, is not sufficient allegation of a legal location. Jones v. Jackson, 9 Cal. 238; Hall v. Arnot, 80 Cal. 348; 22 Pac. Rep. 200.

312. The approved plat of survey of a mining claim must show the date of location of the claim. Hall v. Street, 3 L. D. 40.

313. The survey of a group of contiguous locations must show the boundaries of each of such locations. S. F. Mackie, 5 L. D. 199; Golden Sun M. Co., 6 L. D. 808.

314. A hearing will be allowed for the submission of evidence explanatory of a seeming discrepancy between the boundaries of a claim as located and as shown by the survey thereof. Emma Lode, 7 L. D. 169.

315. The survey of a mining claim must be made in accordance with the location made the basis of the order for the survey. If the location is amended after the issuance of such order, and the survey is made in accordance therewith, resurvey will be required. Lincoln Placer, 7 L. D. 81.

316. A mining claimant has a right to a survey of his claim in accordance with his location. Orient & Occident Lodes, 7 C. L. O. 82.

317. A survey of a mining claim made prior to the date of location thereof cannot be regarded as the official survey. X Sulphur Mine, 5 C. L. O. 100; Sickel's Min. Dec. 98; Copp's Min. Lands, 230; Lincoln Placer, 7 L. D. 81; Rose Nos. 1 and 2 Lodes, 22 L. D. 88.

318. The right to hold a mill site under section 2337, United States Revised Statutes, must be initiated by the location of the same as a mining claim. Rico Town Site, 1 L. D. 556; Hargrove v. Robertson, 15 L. D. 499.

319. A mill site may be located prior to the application for patent for the lode claim in connection with which it is to be used. Hargrove v. Robertson, 15 L. D. 499.

320. A location must be based on a particular vein, the position of which governs the locator's rights. Albert Johnson, 7 C. L. O. 35.

321. "While the law prescribes a limitation to the size of a single location, there is no limitation to the number of claims one person may hold by purchase, or that may be included in a single patent, and as I understand, that may be included in a single survey, showing only the exterior boundaries, and omitting all interior lines of the several smaller claims." Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597. (Citing Polk's Lessee v. Wendall, 9 Cranch, 87; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.)

322. A survey, an application for patent and an entry may embrace any number of contiguous mining locations owned in common. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Good Return M. Co., 4 L. D. 221; S. F. Mackie, 5 L. D. 199; Circular, March 24, 1887, 8 L. D. 505.

323. Tunnel owners are required to make proper locations of their tunnel claims. David Hunter, 5 C. L. O. 130.

324. A lode is located, but the location certificate is defective for uncertainty. A town site entry is then made. Then the lode location is amended. Two patents are issued. *Held*, that the location, being invalid, may not be amended after the intervention of adverse town site rights. Tombstone Town Site Case, 15 Pac. Rep. 26.

325. Fourteen hundred feet on a lode in Colorado were located by three persons October 31, 1866; relocated in 1867 with sixteen hundred feet additional, and the entire claim relocated in 1869 by fourteen persons. *Held*, that the last was good, and the applicants, being the assignees of the first, second and third locators, have a good title. Equator M. & Sm. Co., 2 C. L. O. 114.

326. A subsequent locator cannot complain that the first claim was not properly located in the first instance if the location was perfected before such subsequent location. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; McGinnis v. Egbert, 8 Colo. 41; 15 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

327. Where A. and B. claim by location, and A. relocates to avoid relocation by strangers, and afterwards acquires B.'s title, the work done on the relocation may be taken as a resumption of work on the original location if A. elects to claim thereunder. Johnson v. Young, 18 Colo. 625; 34 Pac. Rep. 178.

328. By an amended location, a junior locator acquires a right to the conflict with a prior location then abandoned. Subsequent resumption of work by the first locator will not defeat this right. Johnson v. Young, 18 Colo. 625; 34 Pac. Rep. 173.

329. There is no limitation to the number of locations one person may make or hold, nor to the number which may be embraced in one patent. Poire v. Wells, 6 Colo. 406;

St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

330. A failure to complete a location within the time allowed by State statute may be excused by the wrongful adverse possession of the claim by third persons. Erhardt v. Boaro, 2 McCrary, 141; 1 Mor. Min. Rep. 452. See 118 U. S. 537, to same effect.

331. After the termination of an agreement to prospect for and locate mining claims, none of the parties are bound to perfect incomplete locations for the benefit of others, but may do so for themselves. Page v. Summers, 70 Cal. 121; 12 Pac. Rep. 120; 15 Mor. Min. Rep. 617.

332. A valid location must be so made that upon compliance with the law a patent might be issued embracing the surface evidences of location, except, perhaps, one or more boundary stakes. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

333. A location notice is fatally defective if it fails to state under oath the date of location. O'Donnell v. Glenn, 9 Mont. 452; 23 Pac. Rep. 1018.

334. The fact that a location laps over a prior location does not invalidate the subsequent one as to the ground subject to such location. Doe v. Tyler, 14 Pac. Rep. 875.

335. Lode claims may be located across each other. Cheesman v. Hart, 42 Fed. Rep. 98.

336. A mining claim may be conveyed by name, reference being made to the location record. Carter v. Bacigalupi, 23 Pac. Rep. 361.

337. A separate patent on each mining location is not contemplated. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

338. When a valid location has been shown, performance of annual assessment work need not be shown unless non-performance thereof and relocation be alleged, and evidence thereof be given by the other party. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345; Mattingly v. Lewisohn, 35 Pac. Rep. 111; Quigley v. Gillett, 101 Cal. 462; 35 Pac. Rep. 1040.

339. The failure of a prior locator to adverse the application of a subsequent locator of a conflicting claim is a waiver of his priority. Gustavus Hagland, 1 L. D. 591.

340. A conveyance of a lode carries all title thereto, whether held under one or more locations thereof, and the name used is immaterial if the intent is clear. Phillpotts v. Blasdell, 8 Nev. 61; 4 Mor. Min. Rep. 341; Weill v. Lucerne M. Co., 11 Nev. 200; 3 Mor. Min. Rep. 872.

341. On an adverse suit, if the defendant shows a *prima facie* good location, the plaintiff must either show a better one or that defendant's lode does not extend into the ground in conflict. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

342. For discussion of the question as to when the locator of a mining claim is a trespasser, see Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

343. Land left in a forty-acre tract after the exclusion therefrom of mineral surveys may be located and described in an application for patent by the lot number given it by the Surveyor General. Geo. B. Foote, 9 C. L. O. 113.

344. The cancellation of a mineral entry for non-compliance with antecedent statutory requirements does not affect the possessory rights of the applicant. John R. Magruder, 12 C. L. O. 51; McGowan v. Alps Cons. M. Co., 23 L. D. 113.

345. A location under which the land containing the improvements has been excluded in favor of a subsequent locator will not support a mineral entry under section 2325, United States Revised Statutes. Independence Lode, 9 L. D. 571.

346. As to what are prerequisites to a valid location, see Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

347. The location of a vein or lode as running in a certain direction, not marked or developed for years, but simply indicated by a notice, is invalid as against a claim subsequently located on ground different from that indicated, after the development of the latter claim without objection, although subsequent explorations by the first locators disclose the fact that their vein in its true course is covered by the subsequent claim. O'Reilly v. Campbell, 116 U. S. 418.

348. The validity of a location based upon a discovery made within a prior location, with the consent of the prior locator, may not be questioned on that account by a grantee of such prior locator, as the assent of

his grantor to the making of the second discovery and location operated as an abandonment of conflicting rights. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

349. "The last position of the court below, that the owner of contiguous locations who seeks a patent must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been performed, is as untenable as the rulings already considered." St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 678.

350. The lines of location must be shown on the survey and plat. Philip Dephanger, 8 C. L. O. 189.

351. A location must not cover a prior valid location, and if it does it is *void*. Faxon v. Barnard, 4 Fed. Rep. 705.

352. The possessory right of miners is recognized by the acts of 1866 and 1872. Forbes v. Gracey, 94 U. S. 762.

353. When plaintiff's ownership and right of possession are put in issue by answer, he must show affirmatively compliance with the act of Congress and local rules and regulations, and that he had thereby made a valid location. Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153. (See 130 U. S. 291.) Terrible M. Co. v. Argentine M. Co., 5 McCrary, 639.

354. The Land Department can take no judicial cognizance of the location of mining claims, as no record thereof is kept by it. Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584.

355. The validity of a mining location may not be questioned in an ejectment suit where both parties claim under such location. Union Cons. M. Co. v. Taylor, 100 U. S. 37; 5 Mor. Min. Rep. 328.

356. A location invalid when made is *void*. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510.

357. Miners should not be held to technical accuracy in the matter of description of their claims. Prince of Wales Lode, 2 C. L. O. 2.

358. A mining claim may include any number of adjacent locations. Poire v. Wells, 6 Colo. 406.

359. The failure of government surveyors to segregate mineral from agricultural lands cannot operate to the injury of occupant miners. Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

360. When an application to enter agricultural land is made, if the locators of mining claims on the land have any objections they must be vigilant in presenting them. The rules and regulations provide ample means for this purpose, and, if the remedies are not pursued, the mineral claimants will not be heard to complain. Departmental decision of March 11, 1896, *In re* Caribou Lode.

361. The fact that a part of a mining location on which were situate the improvements was, after location patented to an agricultural claimant, does not render the location invalid, at least as to a subsequent locator not claiming under the agricultural patentee. Richards v. Wolfing, 98 Cal. 195; 32 Pac. Rep. 971.

362. A mining location in Alabama, made prior to March 3, 1883, and properly maintained, entitles the locator to make entry thereof on due compliance with law, notwithstanding the provision of the act of that date (22 Stat. 487) providing that lands in Alabama should be disposed of only as agricultural lands. Cordell Placer, 4 L. D. 476.

363. A mining claim was worked until 1869, and was then abandoned. A town site patent issued in 1869, covering the claim. The claim was located subsequently, in 1884. *Held*, that the claim was not such a mine as would be excepted from the town site patent. Richards v. Dower, 81 Cal. 44; 22 Pac. Rep. 304. See 151 U. S. 658.

364. Prior to the act of August 4, 1892 (27 Stat. 348), there was no authority for the location of land chiefly valuable for building stone, under the placer laws, and the passage of said act cannot validate prior locations in the face of an intervening adverse right. Clark v. Ervin, 16 L. D. 122; Departmental Instructions of August 29, 1896.

365. The fact that land has been located as a mining claim is not, in itself, proof of the mineral character of the land, especially where the burden of proof is upon the mineral claimant. Etling v. Potter, 17 L. D. 424.

366. The fact that land was once embraced in a mining location, since abandoned, is not proof of its mineral character, which must

appear as a present fact. Berry v. C. P. R. R. Co., 15 L. D. 463.

367. After patent has issued for a town site, a miner may not locate a claim inside the patented limits, and then attack the validity of the town site patent on the ground that the land located was known to be mineral at date of town site entry. The patent must be attacked directly if at all. Carter v. Thompson, 65 Fed. Rep. 329.

368. A mine cannot be located on land patented to a railroad company, although mines were excepted out of its grant. The patent is conclusive of legal title until vacated by a proper tribunal. Cowell v. Lammers, 21 Fed. Rep. 200; 3 West Coast Rep. 504.

369. A lode to be excepted from a town site patent need not have been located at date of town site entry. It is excepted if known. Dower v. Richards, 78 Cal. 477; 15 Pac. Rep. 105.

370. Where a mining claim is located upon land afterwards entered as a town site, the prior issuance of the town site patent does not affect the mining location, since the mining patent, when issued, takes effect from the date of the location of the claim by relation. Chambers v. Jones, 17 Mont. 156.

371. A person claiming under a mineral location to be entitled to the possession as against one claiming under a patent to a railroad company must show that at date of such patent the land was *known* to be more valuable for mining than for agricultural purposes, and, in determining the relative value for such purposes, subsequent changes cannot be considered. Hunt v. Steese, 75 Cal. 620; 17 Pac. Rep. 920.

372. If a lode is not known at date of agricultural entry, but is subsequently discovered and located, the claimant may not follow it on its dip under the agricultural claim. Amador-Medean G. M. Co. v. South Spring Hill G. M. Co., 13 Sawy. 523; 36 Fed. Rep. 668.

373. The presumption arising from the return of land as agricultural is rebutted by a valid mining location based on a proper discovery. Rhodes v. Treas, 21 L. D. 502.

374. After a town site has been patented no location of a mining claim can be made therein. G. R. Williams, 9 C. L. O. 147.

375. The fact that land on which the discovery and location of a mining claim are made is within the patented limits of a town will not affect the title of the locator where it was known prior to the patent to the town that a mineral vein existed where the discovery and location were made. Moyle v. Bullene, 44 Pac. Rep. 69 (Colorado).

376. The occupancy of land for town site purposes will not prevent its legal location as a mining claim. Poire v. Wells, 6 Colo. 406.

377. A cash entry may be suspended to await developments under a mining location. Ewing v. Hartman, 1 C. L. O. 180.

378. A lode known to exist at date of the issuance of a town site patent covering the same (or at date of the town site entry) is subject to subsequent location notwithstanding the issuance of said patent. Moyle v. Bullene, 44 Pac. Rep. 69 (Colorado).

379. A prior mining location is not affected by a town site entry. The mining claimant need not file an adverse claim. Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858.

380. The relative rights of persons claiming under a mining location and a town site claim must be settled in court, and patents may issue with reservation clauses. Following Departmental decision of Dec. 18, 1880, *In re* Little Nettie Lode and Rico Town Site, 1 L. D. 556; M. A. Hickey, 3 L. D. 83. *Contra*, Deffeback v. Hawke, 115 U. S. 392; Davis' Adm'r v. Weibbold, 139 U. S. 507.

381. Mineral land is subject to location only under the mining law without reference to the value of a portion for a town site. Kemp v. Starr, 6 C. L. O. 8.

382. A prior mining location is not affected by town site occupation. Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

383. Only veins containing metalliferous ores are subject to location. Montague v. Dobbs, 9 C. L. O. 165; Dobbs Placer (S. C.), 1 L. D. 565.

384. Veins of clay or non-metalliferous substances are subject to location as placers. Montague v. Dobbs, 9 C. L. O. 165; Dobbs Placer (S. C.), 1 L. D. 565.

385. The location of a mining claim, *prima facie* valid, raises the presumption of the mineral character of the land. Sweeney v. N. P. R. R. Co., 20 L. D. 394.

386. Unoccupied town site land may be located and entered as a mining claim. Steele v. St. Louis Smelting Co., 106 U. S. 447; Deffeback v. Hawke, 115 U. S. 392; Sparks v. Pierce, 115 U. S. 408.

387. Lands valuable for deposits of mineral-bearing tailings (apparently) may be located as a mining claim. Rogers v. Cooney, 7 Nev. 213.

388. A location of a placer claim, using names of persons as co-locators who are not intended to have any real interest but who are to convey their rights after location, is a fraud on the government. Mitchell v. Cline, 84 Cal. 409; 24 Pac. Rep. 164.

389. A location of one hundred and sixty acres as a placer claim is an entirety, constituting but a single location. Com'r to John Cowell, June 5, 1893.

390. A location of a placer claim of one hundred and sixty acres is a location of but one claim and there is no necessity of marking every twenty acres thereof. Com'r to Aaron F. Parker, April 12, 1893.

391. Under section 2319, United States Revised Statutes, minors who are citizens of the United States may locate mining claims. Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182.

392. A location by a minor is not necessarily invalid. Com'r to Francis Cunningham, 7 C. L. O. 179.

393. No distinction is made in locating mining claims on account of sex of the locator. Com'r to Eureka Office, Nov. 13, 1877, 4 C. L. O. 179.

394. An alien may neither locate nor hold a mining claim. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Lee Doon v. Tesh, 68 Cal. 43; 8 Pac. Rep. 621; Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419; Bohanon v. Howe, 2 Idaho, 417; 17 Pac. Rep. 583; Territory v. Lee, 2 Mont. 124; 6 Mor. Min. Rep. 248; Tibbitts v. Ah Tong, 4 Mont. 536; Wulff v. Manuel, 9 Mont. 279; 23 Pac. Rep. 723; Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; Lee v. Justice M. Co., 29 Pac. Rep. 1020.

395. A conveyance of a mining claim by a qualified locator to an alien does not operate as an abandonment of the claim, but the alien may hold the claim as against all but the United States; and where the alienage of an applicant is set up by an adverse claimant, the declaration of intention to become a citizen, made by the applicant during the pendency of the adverse suit, but before judgment, will render his title good as far as citizenship is concerned. Manuel v. Wulff, 152 U. S. 505. (Reversing Supreme Court of Mont., 9 Mont. 279. Citing Man v. Huk, 3 L. D. 452; Ole Krogstad, 4 L. D. 564; Lord v. Perrin, 8 L. D. 536; Jackson v. Beach, 1 Johns. Cas. 399; Governeur v. Robertson, 11 Wheat. 332; Osterman v. Baldwin, 6 Wall. 116.)

396. A conveyance of a mining location by a qualified locator to an alien is not an abandonment of the location, but the alien may hold as against all but the State or the United States, and a conveyance by him to a citizen carries good title. Gorman M. Co. v. Alexander, 2 S. Dak. 557; 51 N. W. Rep. 346.

397. In the absence of evidence to the contrary, locators are presumed to be citizens or to have declared their intention to become such. Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291.

398. The oath to a notice of location required by the Montana statutes, in which it is asserted by one of several locators that all of the locators are citizens of the United States, is *prima facie* proof of such citizenship. Hammer v. Garfield M. & M. Co., 130 U. S. 291.

399. If an alien locator conveys his claim to a citizen before the attachment of adverse rights, his grantee has good title if he maintains the claim. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

400. A location of no more land than might have been located by one person is not invalidated by the fact that one of the several locators was an *alien*, but will be good as to the citizens. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 15 Nev. 450; 12 Nev. 312; 1 Mor. Min. Rep. 120.

401. Locators and intermediate mine owners other than the applicants will not be presumed aliens in the absence of an allegation to that effect or objection prior to the issu-

ance of patent. Wandering Boy Lode, 2 C. L. O. 2.

402. In application for mining patents, proof of citizenship is not required of the original locator or intermediate owners, but of the applicants for patent or adverse claimants only. Cash Lode, 1 C. L. O. 98.

403. A foreigner may make a mining location and dispose of it, provided he becomes a citizen before he disposes of the mine. Kempton Mine, 1 C. L. O. 178.

404. A mining claim passing into the possession of an alien, although located by a citizen, reverts to the government and may be relocated. Tibbitts v. Ah Tong, 4 Mont. 536.

405. A transfer to an alien is an abandonment of the locator's right. Lee v. Justice M. Co., 29 Pac. Rep. 1020.

406. A location by an alien is validated by his declaration of intention of becoming a citizen before the intervention of adverse rights. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

407. The title of a claimant of the public mineral lands as locator of a mining claim may not be questioned on the ground of alienage by any one excepting the United States, or in proceedings to obtain United States patent (on adverse suit). Billings v. Aspen M. & Sm. Co., 51 Fed. Rep. 338; 10 U. S. App. 1, 322; Wood v. Aspen M. & Sm. Co., 36 Fed. Rep. 25.

408. A location by an alien is void, and is not validated by a subsequent declaration of intention. Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419.

409. An alien, although he may not locate or enter public lands, may, until office found, hold a mining claim under possessory title as grantee of a qualified locator. Ferguson v. Neville, 61 Cal. 356.

410. In a suit for trespass upon a mining location plaintiff must show citizenship, and if defendant justifies under another location he must show citizenship, as no rights could be acquired by location without it. Bohanon v. Howe, 2 Idaho, 417; 17 Pac. Rep. 583.

411. The evidence of one plaintiff that he was a citizen of the United States at the time of location, and that the other plaintiffs were his children, born in California, is sufficient proof of citizenship of plaintiffs at the time of location. Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182.

412. A territory cannot declare or enforce a forfeiture of a mining claim located or held by an alien. Territory v. Lee, 2 Mont. 124; 6 Mor. Min. Rep. 248.

413. One who claims under a location may not defeat the right of one of the locators to a share of the proceeds of the mine by alleging alienage of such locator. Billings v. Aspen M. & M. Co., 52 Fed. Rep. 250.

414. One claiming by purchase a mining location must allege citizenship of the locator. Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419.

415. Where a location is made by a citizen and an alien, and the alien thereafter declares his intention of becoming a citizen, the citizen cannot, by relocation, cut his co-owner out on the ground that the original location was void as to the alien. Sever v. Gregovich, 16 Nev. 325.

416. Possessory title to a mining claim may not be held by a State or Territory, as it is not one of the persons named in section 2325, United States Revised Statutes. Territory v. Lee, 2 Mont. 124; 6 Mor. Min. Rep. 248.

417. A corporation, organized under the laws of a State for the purpose of mining, may locate a mining claim as a citizen of the United States. McKinley v. Wheeler, 130 U. S. 630; Thomas v. Chisholm, 13 Colo. 105; 21 Pac. Rep. 1019.

418. A party to an adverse suit claiming under a location made by a corporation must allege and prove such corporation to have been organized in some of the States or Territories of the United States, and that its members were individually qualified to make the location. Thomas v. Chisholm, 13 Colo. 105; 21 Pac. Rep. 1019.

419. A placer location made by A., B. and C. in their own names, but for the use of a corporation, may cover only that area which the corporation might locate, viz., twenty acres. Gird v. California Oil Co., 60 Fed. Rep. 531.

420. A location may be made by an agent. Gore v. McBrayer, 18 Cal. 582; 1 Mor. Min. Rep. 645; Morton v. Solambo M. Co., 26 Cal. 527; 4 Mor. Min. Rep. 463; Murley v. Ennis, 2 Colo. 300; 12 Mor. Min. Rep. 360; Kramer v. Settle, 1 Idaho, 485; 9 Mor. Min. Rep. 561;

Schultz v. Keeler, 2 Idaho, 805; 13 Pac. Rep. 481; Dunlap v. Pattison, 42 Pac. Rep. 504.

421. An agent may locate a mining claim, but unless specifically authorized he cannot divest his principal of title so acquired. Gore v. McBrayer, 18 Cal. 582; 1 Mor. Min. Rep. 645.

422. A mining location may be made by an agent, who may, as agent, also make any necessary affidavits pertaining thereto. Dunlap v. Pattison, 42 Pac. Rep. 504.

423. A location may be made by an agent, and in the absence of a contrary showing a location purporting to be made by an agent for a principal will be presumed to be made with the assent of the principal. Gore v. McBrayer, 18 Cal. 582; 1 Mor. Min. Rep. 645.

424. "A party in whose name a location of a mining claim is made is presumed *prima facie* to assent to the same. Van Valkenburg v. Huff, 1 Nev. 142; 9 Mor. Min. Rep. 467; Morton v. Solambo M. Co., 26 Cal. 527; 4 Mor. Rep. 463.

425. One may locate a mining claim for himself and others. Gore v. McBrayer, 18 Cal. 582; 1 Mor. Min. Rep. 645; Morton v. Solambo M. Co., 26 Cal. 527; 4 Mor. Min. Rep. 463.

426. A location made by an individual in his own name may be shown to have been made by him as agent of another. Sold Again Lode, 20 L. D. 58.

427. When A. locates for B., it is presumed that he has authority so to do. Rush v. French, 1 Ariz. 99; 25 Pac. Rep. 816.

428. A location made by A. in the name of B. constitutes B. the legal owner, and A. cannot compel B., as trustee, to convey to him. Moore v. Hammerstag, 109 Cal. 122; 41 Pac. Rep. 805.

429. If the locator of a mining claim inserts in the location notice the names of others, they become tenants in common with the one making the location. The locator cannot dispose of the other interests unless authorized so to do. Chase v. Savage S. M. Co., 2 Nev. 9; 9 Mor. Min. Rep. 476.

430. Only twenty acres of placer ground can be embraced in a single location by one person. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

431. Placer claims may be located jointly by two or more persons. Chapman v. Toy Long, 4 Sawy. 28; 1 Mor. Min. Rep. 497.

432. If A. locates a claim in the name of B., and holds and works the same, the law presumes it to be done by A. as agent for B., and A. can maintain no action for the claim in his own name. Van Valkenburg v. Huff, 1 Nev. 142; 9 Mor. Min. Rep. 467.

433. A. and B. are mining and prospecting partners. A discovery is made but no location. After dissolution of partnership A. makes a location. *Held*, that B. has no interest in this location. Page v. Summers, 70 Cal. 121; 12 Pac. Rep. 120; 15 Mor. Min. Rep. 617; McLaughlin v. Thompson, 29 Pac. Rep. 816.

434. Where the record shows the survey of a mining claim to have been based upon an amended location made by a stranger in his own name, the applicant for patent may show by affidavits that such stranger, in making the amended location, acted as his agent. Gray Copper Lode, 18 L. D. 536.

435. An amended location made by a stranger to the record may be shown to have been made in trust for the real owner. Com'r to Denver Office, Nov. 2, 1894, *In re* Silk Finish Lode.

436. A partnership is not constituted by an oral agreement to locate claims as partners where no joint capital is used. Craw v. Wilson, 40 Pac. Rep. 1076.

437. A location made by several persons may not be renewed (or amended) by some of the original locators associated with strangers, omitting the names of some of the original locators to their injury. Strang v. Ryan, 46 Cal. 33; 1 Mor. Min. Rep. 48.

438. Where one of two discoverers acquired the right of the other, and erased the name of the other from the location notice and remained in sole possession, the alteration of the notice did not amount to an abandonment of the original location. Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

439. A locator of a mining claim is estopped from denying the validity of the location after selling it to another. Stinchfield v. Gillis, 96 Cal. 33; 30 Pac. Rep. 839; S. C., 107 Cal. 84; 40 Pac. Rep. 98.

440. The declarations of a party in possession and claiming title to a mining claim, made before parting with his interest, against the validity of the location of such claim, are admissible as evidence against the grantee of

the declarant. Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362.

441. "Under the requirements of the law, a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following, with the expectation of finding ore; and a valid location of a mining claim may be made of a ledge deep in the ground, and appearing at the surface not in the shape of ore, but in vein matter only." A discovery stake was set September 16, and the claim partly staked September 17, the location being completed September 18. The location dates back to September 16. Burke v. McDonald, 2 Idaho, 1022; 29 Pac. Rep. 98.

442. A discovery of a vein or lode of mineral-bearing rock in place is a prerequisite to a valid location. Jackson v. Roby, 109 U. S. 440; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329; Bryan v. McCaig, 10 Colo. 309; 15 Pac. Rep. 413; Burke v. McDonald, 2 Idaho, 649; 33 Pac. Rep. 49; Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390; Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66; Gleeson v. Martin White M. Co., 13 Nev. 457; Overman Silver M. Co. v. Corcoran, 15 Nev. 147; 11 Mor. Min. Rep. 691; Waterloo M. Co. v. Doe, 17 L. D. 111; Etling v. Potter, 17 L. D. 424; Winter Lode, 22 L. D. 362.

443. Failure of claimant to make a discovery of a vein of mineral-bearing rock in place within his location may be set up before the Land Department by one who has failed to file an adverse claim. Waterloo M. Co. v. Doe, 17 L. D. 111.

444. "It is the finding of the mineral in rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim." Book v. Justice M. Co., 58 Fed. Rep. 106.

445. It is not required, under section 2320, United States Revised Statutes, that paying mineral necessary to justify the location of the claim should be found at the time and place of the discovery, but it is sufficient if the development of the vein showed that paying mineral exists within the limits of the location. McShane v. Kenkle, 44 Pac. Rep. 979 (Mont.).

446. A location of a placer claim must be based on a discovery of a valuable mineral deposit. Reins v. Murray, 22 L. D. 409.

447. A discovery of mineral is not a prerequisite to a location of a placer mining claim. Gregory v. Pershbaker, 73 Cal. 109; 14 Pac. Rep. 401; 15 Mor. Min. Rep. 602.

448. A discovery of mineral-bearing rock in place is not essential to a valid discovery, which may be made upon croppings. Failure to perfect a location within the time prescribed by law may be excused by illegal occupancy of the ground by other persons. Erhardt v. Boaro, 3 McCrary, 19; 2 Colo. Law Rep. 89; 4 Mor. Min. Rep. 494. (See 113 U. S. 527.) Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616; Davidson v. Bordeaux, 15 Mont. 245; 38 Pac. Rep. 1075.

449. A location based on a discovery on the dip of the lode is void. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

450. A location notice need not show the position of the discovery shaft. Quimby v. Boyd, 8 Colo. 194; 6 Pac. Rep. 462.

451. A lode discovered in a tunnel run in accordance with the provisions of section 2323, United States Revised Statutes, and of which a location notice was posted at the mouth of the tunnel, and duly recorded, need not be located by the discoverer on the surface to protect his right, and a subsequent locator on the surface acquires no rights against the tunnel location. Ellet v. Campbell, 18 Colo. 510; 33 Pac. Rep. 521.

452. A discovery of a lode in a tunnel gives the right to make a surface location thereof, just as a discovery on the surface would do. Rico-Aspen M. Co. v. Enterprise M. Co., 53 Fed. Rep. 321.

453. On the discovery of a lode in a tunnel, within three thousand feet of the face thereof, the tunnel claimant may locate fifteen hundred feet of such lode, subject only to the requirement that his discovery must be covered by his claim. Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. Rep. 200.

454. The locator who has a vein extending through his claim owns all other veins whose apexes are within his claim, and may

adverse an application for a conflicting claim located on one of such other veins. Freeland v. Hoffman, 13 Mor. Min. Rep. 289.

455. An unauthorized underground working of a lode will not prevent its location by the discoverer of the apex, as "The possession of a vein recognized by the mining laws and to which protection is given, is by one who holds the surface where the vein makes its apex." Eilers v. Boatman, 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462. See 111 U. S. 356; 15 Mor. Min. Rep. 471.

456. A locator need not be the discoverer of the vein located, but must have known of its existence. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Book v. Justice M. Co., 58 Fed. Rep. 106.

457. A discovery after location, but before the intervention of adverse rights, validates the location. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Zollars & Highland Chief Cons. M. Co. v. Evans, 2 McCrary, 39; 4 Mor. Min. Rep. 407; Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390; Patchen v. Keeley, 19 Nev. 404; 14 Pac. Rep. 347; Wight v. Tabor, 2 L. D. 738; Branagan v. Dulaney, 2 L. D. 744; James Mitchell, 2 L. D. 752.

458. A location void at the time it was made because of no discovery continues and remains void, and is not cured by a subsequent discovery on the claim located. Upton v. Larkin, 5 Mont. 600; 6 Pac. Rep. 66; S. C., 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404.

459. A location based on a discovery made within the limits of a prior subsisting location is invalid. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

460. A location based upon a discovery made upon a prior location may be validated by a relinquishment of the ground including such discovery, by the senior locator, before the intervention of adverse rights. McEvoy v. Hyman, 25 Fed. Rep. 596; 15 Mor. Min. Rep. 397.

461. In adverse proceedings defendant may defeat plaintiff's claim by showing that plaintiff's location was upon land not subject to location, having been included in the exterior limits of a patent to a third person. Girard v. Carson, 44 Pac. Rep. 508. (Citing Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.) Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

462. A second discovery of mineral within the limits of a legal location is valueless to other claimants. Hibschle v. Gildersleeve, 8 C. L. O. 66 (Colorado court).

463. A. locates with no discovery. He may hold it as against B., who has made no discovery. Field v. Grey, 25 Pac. Rep. 793.

464. Where two conflicting locations are made, neither based on a discovery, the second locator has the better right if he first discovers mineral. Crossman v. Pendery, 2 McCrary, 139; 1 Colo. Law Rep. 496; 4 Mor. Min. Rep. 431.

465. A. locates, then B. does. If B. gets mineral first, he has the superior right. But A. may keep B. off as a trespasser before B.'s discovery. Crossman v. Pendery, 8 Fed. Rep. 693.

466. The first discoverer who completes a legal location within the time allowed therefor is protected against a location previously perfected by a subsequent discoverer. Pelican & Dives M. Co. v. Snodgrass, 9 Colo. 339; 12 Pac. Rep. 206.

467. When two locations are based upon one discovery, only one of them can be valid, and the party claiming under one of them must show that one to be the valid one. McKinstry v. Clark, 4 Mont. 370; 1 Pac. Rep. 759.

468. A discovery made in a shaft on the line of a claim and partly within the limits of a prior location is valid. Larkin v. Upton, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66. (Affirmed, S. C., 144 U. S. 19.)

469. A mineral entry of two locations based on one discovery of mineral in a discovery shaft on the line between the two locations will be canceled. Poplar Creek Cons. Qtz. Mine, 16 L. D. 1.

470. Two locations may not be made on one discovery, but (*semble*) two discoveries may be united in one discovery shaft. McKinstry v. Clark, 4 Mont. 370; 1 Pac. Rep. 759.

471. Evidence that the discovery shaft is not upon claimed ground is admissible as going to show the invalidity of the claim. McGinnis v. Egbert, 8 Colo. 41; 15 Mor. Min. Rep. 329; 5 Pac. Rep. 653.

471a. "It [sec. 2320, U. S. Rev. Stat.] allows a claim to be located to the extent of fifteen hundred feet along the vein or lode, but provides that no location shall be made until the discovery of the vein or lode within the limits of the claim located, which is, in effect, a declaration that locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits shall not be permitted. A location can only rest upon an actual discovery of the vein or lode." King v. Amy and Silversmith M. Co., 152 U. S. 222.

472. The discovery and location of a claim in pursuance of the law is equivalent to a contract of sale and purchase where the purchaser is let into possession and becomes entitled to a deed upon payment of the purchase-money and making of a certain expenditure. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

473. The workings which show mineral made the basis of the location need not be made by the locator. Wenner v. McNulty, 7 Mont. 30; 14 Pac. Rep. 643.

474. An assay of a rock taken from a claim, though long subsequent to the location, goes to show that a lode existed in the claim at date of location, and hence tends to strengthen any evidence of a discovery at the date of location. Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; 9 Mor. Min. Rep. 513.

475. A lode location will be presumed to cover the lode discovered in the absence of a showing to the contrary. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

476. One who, by force and intimidation, has prevented the discoverer of a lode from perfecting his location will not be heard to set up a discoverer's failure so to do, as that would be to allow him to profit by his own wrong. Miller v. Taylor, 6 Colo. 41; 9 Mor. Min. Rep. 547.

477. Failure to sink a discovery shaft within sixty days from date of discovery is of no effect if rendered impossible by duress (Colorado). Erhardt v. Boaro, 2 McCrary, 141; 8 Fed. Rep. 692. See 113 U. S. 527; 4 Mor. Min. Rep. 432.

478. A purchaser from a discoverer before the location of a claim is completed must perfect the location within the time allowed from date of discovery to protect his rights. Zeckendorf v. Hutchison, 1 New Mex. 476; 9 Mor. Min. Rep. 483.

479. In the absence of a statute a discoverer is entitled to a reasonable time within which to perfect his location. Murley v. Ennis, 2 Colo. 300; 12 Mor. Min. Rep. 360. Ninety days is an unreasonably long time. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

480. A discovery elsewhere than in the discovery shaft, after location, will not avail to hold the claim, as the location rests on what may be found in the discovery shaft. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

481. A discovery although not in the discovery shaft is sufficient as a basis for a location. Evidence showing such discovery is admissible. O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302.

482. A discovery of mineral in the discovery shaft need not be made before location and filing of location certificate, in the absence of the intervention of adverse rights. Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 663.

483. In ejectment plaintiff must prove a legal location based on a discovery of mineral-bearing rock in place, in a discovery shaft, such as is required by State statute. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

484. Discovery and appropriation are recognized as the source of title to mining claims, and development by working, as the condition of continued ownership until issuance of patent therefor (entry of the claim and payment for the land). Erhardt v. Boaro, 2 McCrary, 141; 1 Mor. Min. Rep. 452. See 113 U. S. 527.

485. A location of a lode claim must be based on a discovery of a vein or lode on vacant public land. If the discoverer whose sole discovery is upon a conflicting claim allows such conflicting claim to be patented inclusive of his discovery, he loses all right under his location, and his claim becomes open to exploration and location by others. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

486. Where the original discovery shaft of a mining location is included within a subsequent location as patented, on the failure of the first locator to commence adverse proceedings within the time required, or to set up a new discovery stake at a new discovery shaft on unappropriated ground, he loses all rights under the prior location not only as against the patentee but also as against subsequent locators. Girard v. Carson, 44 Pac. Rep. 508 (Colo.).

487. As between mineral claimants, when it is alleged by one that the lode claim of the other was not based on a valid discovery prior to location, it is no part of the defense to show the existence of a valuable deposit of mineral. The value of the mineral deposit is a matter into which the government does not inquire after discovery and location save in controversies between mineral and agricultural claimants. Tam v. Story, 21 L. D. 440.

488. The location of a mining claim is warranted where mineral is discovered such as would justify a person of ordinary prudence in expenditure of labor and means to develop the claim. Castle v. Womble, 19 L. D. 455.

489. The law does not impose any conditions as to the value or extent of the ore. It simply provides that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located. Book v. Justice M. Co., 58 Fed. Rep. 106.

490. Mere discovery of fragments of mineral-bearing ore not in lode formation will not form the basis of a valid location of a lode claim. Waterloo M. Co. v. Doe, 56 Fed. Rep. 685.

491. A claimant who locates a claim in good faith, as discoverer of a vein afterward found to be part of one great lode underlying a large tract, is entitled to the additional two hundred feet of the vein allowed by law to discoverers. Richmond M. Co. v. Rose, 114 U. S. 576.

492. The fact that a location is based upon a discovery within a prior location does not, *proprio vigore*, invalidate the second location, as, if application is made therefor and no adverse claim is filed, it is conclusively presumed that the first locator had no right to the ground common to the two locations. Branagan v. Dulaney, 2 L. D. 744.

493. As the evidence shows that the oil placer mining claim was located in good faith, it is no defense to a trespass act to say that mineral does not exist upon the mining claim. Van Horn v. State of Wyoming, 40 Pac. Rep. 964.

494. When the validity of a claim depends upon whether a lode has been discovered and located, evidence that such claim contains a vein within its boundaries at places other than at the discovery point is admissible. Harrington v. Chambers, 8 Utah, 94; 1 Pac. Rep. 362.

495. Evidence as to the extent and richness of the vein as developed subsequent to location is inadmissible for the purpose of showing the location to have been based upon a discovery thereof. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

496. A party to an adverse suit may show the location of his adversary to be invalid because based upon a discovery made within the limits of a prior subsisting location of a third party. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362; Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

497. Where more than twenty acres is embraced in one placer location, a discovery of mineral must be shown in every twenty acres. Ferrell v. Hoge, 18 L. D. 81; Louise M. Co., 22 L. D. 662; Wingate Placer, 22 L. D. 704.

498. A vein need not necessarily crop out on the surface in order that a location may be properly laid upon it; but where the vein does crop out along the surface, or is slightly covered by foreign matter, so that the course of the apex can be readily ascertained, this course should be substantially followed in laying claims and locations upon it. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

499. In the absence of an adverse claim it will be presumed that a lode exists in land covered by a regularly located lode mining claim. Apple Blossom Placer v. Cora Lee Lode, 21 L. D. 438.

500. The presumption arising upon the location of a mining claim that the land covered thereby is mineral in character, though

returned as agricultural, exists only where such location is legally made and based upon a proper discovery. Rhodes v. Treas, 21 L. D. 502.

501. The forcible ouster of one who has discovered a mineral-bearing lode and has posted a notice of his claim thereon, by a trespasser, during the time allowed the discoverer, by law, to perfect his location, and the prevention of the discoverer from compliance with the law in that regard, excuse him, at least as against such intruder, from a performance of the various acts necessary to a legal location. Erhardt v. Boaro, 2 McCrary, 141; 1 Mor. Min. Rep. 452. See 113 U. S. 527.

502. A location of more ground than is allowed by law is void only as to the excess. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607; Richmond M. Co. v. Rose, 114 U. S. 576; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Terrible M. Co. v. Argentine M. Co., 5 McCrary, 639; Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182; Atkins v. Hendree, 1 Idaho, 95; 2 Mor. Min. Rep. 328; Stemwinder M. Co. v. Emma & Last Chance Cons. M. Co., 2 Idaho, 421; 21 Pac. Rep. 1040; Burke v. McDonald, 2 Idaho, 646; 33 Pac. Rep. 491; Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; Hansen v. Fletcher, 10 Utah, 266; 37 Pac. Rep. 480; Doe v. Sanger, 23 Pac. Rep. 363; T. M. Empy, 10 C. L. O. 102. (Questioned in Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. Rep. 714.)

503. Where an extra amount of the lode is claimed by right of discovery, and it is subsequently shown by development that the locators were not the discoverers, the location is void, if at all, only as to the excess. Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; 114 U. S. 576.

504. A patent issued subsequent to 1873 for a claim exceeding a width of three hundred feet on each side of the middle of the vein is void as to such excess. Lakin v. Roberts (Dolly), 53 Fed. Rep. 333; 54 Fed. Rep. 461; 7 U. S. App. 539.

505. A party taking an excess of ground by location may hold the same against an intruder, but not against a subsequent locator. English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202.

506. The inclusion of a larger number of lineal feet than two hundred does not render a location, otherwise valid, totally void. This may occur, and often must occur, by accident of the surveyor, or other innocent mistake. Richmond M. Co. v. Rose, 114 U. S. 576.

507. The location of a narrow strip of land twelve thousand feet long, as a placer claim, extending through three sections, does not conform "as near as practicable" to the rectangular subdivisions of the public surveys. William Rablin, 10 C. L. O. 3. (Overruled S. C., 2 L. D. 764.)

508. Where part of a legal subdivision is non-mineral land, and the gold deposit is in a ravine, a location that follows the mineral deposit conforms to the public surveys as near as practicable. Esperance M. Co., 10 C. L. O. 338; William Rablin, 2 L. D. 764.

509. Absolute accuracy of location is not required of miners. Eilers v. Boatman, 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462; 111 U. S. 356; 15 Mor. Min. Rep. 471; Brady v. Husby, 21 Nev. 453; 33 Pac. Rep. 801; Burke v. McDonald, 2 Idaho, 646; 33 Pac. Rep. 49; Doe v. Sanger, 23 Pac. Rep. 363.

510. A location of a lode claim in the form of a triangle, *i. e.*, having only one end line, gives the locator no right to follow his lode outside of the surface lines of his location. Montana Co. v. Clark, 42 Fed. Rep. 626.

511. Where the end lines of a lode claim are not drawn so as to secure all rights possible under the law, the locator must bear the consequences. The court cannot relocate the claim, making new lines therefor. The most that it can do, where the lines are drawn inaccurately and irregularly, is to give the claimant such rights as his imperfect location warrants, under the law. King v. Amy & Silversmith M. Co., 152 U. S. 22. (Reversing 9 Mont. 543; 24 Pac. Rep. 200.)

512. Where a lode leaves a claim through a side line, for the purpose of ascertaining and defining the right of the owner to follow the lode on its dip under section 2322, United States Revised Statutes, an end line should be drawn through the side line at the point of departure parallel to the original end lines. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607; Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; 15 Mor. Min. Rep. 641; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478; Tyler M. Co. v. Last Chance M. Co., 7 U. S. App. 463; 61 Fed. Rep. 463; 157 U. S. 683;

Fitzgerald v. Clark, 42 Pac. Rep. 273; 157 U. S. 696; Colorado Central Cons. M. Co. v. Turck, 50 Fed. Rep. 888; 4 U. S. App. 290; 12 U. S. App. 85; Tyler M. Co. v. Sweeney, 54 Fed. Rep. 284; 4 U. S. App. 329; Last Chance M. Co. v. Tyler M. Co., 61 Fed. Rep. 557; 9 U. S. App. 618; Stevens v. Williams, 1 McCrary, 480: 1 Mor. Min. Rep. 557; Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Rep. 304; Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. Rep. 540; Del Monte M. & M. Co. v. New York & Last Chance M. Co., 66 Fed. Rep. 212; Tyler M. Co. v. Last Chance M. Co., 71 Fed. Rep. 848; Wilhelm v. Sylvester, 101 Cal. 358; 35 Pac. Rep. 997; King v. Amy & Silversmith Cons. M. Co., 9 Mont. 543; 24 Pac. Rep. 200; Tombstone M. & M. Co. v. Way Up M. Co., 25 Pac. Rep. 794; Watervale M. Co. v. Leach, 33 Pac. Rep. 418.

513. But where the claim is located across instead of along the lode, the side lines will be treated as end lines. King v. Amy & Silversmith Cons. M. Co., 152 U. S. 222.

514. If a location be laid crosswise of a lode or vein, so that its greatest length crosses the same instead of following the course thereof, it will secure only so much of the vein as it actually crosses at the surface, and the side lines of the location will become the end lines thereof for the purpose of defining the rights of the owners. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

515. The law contemplates a location to be made nearly parallel with the line of the vein, and if a locator knowing the line of the vein, and wilfully and with fraudulent purpose, locate his claim in disregard of such line and course of the vein, and establish its length not along the vein but across it to an excess of several hundred feet or more beyond the three hundred feet allowed by Congress, for the fraudulent purpose of gaining and appropriating such excess of surface ground as his mining claim, this would be in deliberate violation of law, and the locator could gain no rights whatever thereby, but his location would be absolutely null and void, and he would be in the same position as if a location had never been attempted to be made. Walsh v. Mueller, 16 Mont. 180.

516. In the location end lines must be established as required by the statute, and where the locator fails to do this, the courts will not fix them by implication. If the end lines be absent or so placed as not to define the right of the locator to the exterior parts of the lode, the defect cannot be supplied. Elgin M. & Sm. Co. v. Iron S. M. Co., 14 Fed. Rep. 880.

517. The validity of a claim is not affected by the fact that as located the end lines are not parallel, if they are made parallel prior to the intervention of adverse rights. Eureka Cons. M. Co. v. Richmond M. Co. (Eureka Case), 4 Sawy. 302; 9 Mor. Min. Rep. 578; Doe v. Waterloo M. Co., 54 Fed. Rep. 935; Horswell v. Ruiz, 67 Cal. 111; 7 Pac. Rep. 197; 15 Mor. Min. Rep. 488; Doe v. Sanger, 83 Cal. 203; 23 Pac. Rep. 365.

518. "Under the act of 1866 (14 Stat. 251), parallelism in the end lines of a surface location was not required; but where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines. His lateral right by the statute is confined to such portion of the vein as lies between such planes drawn through the end lines and extended in their own direction, that is, between parallel vertical planes. It can embrace no other portion." Iron Silver M. Co. v. Elgin M. & Sm. Co. (Horseshoe Case), 118 U. S. 196; 15 Mor. Min. Rep. 641.

519. The end line of a lode claim must be established at the point where the lode applied for passes within a prior excluded location. Consolidated M. Co., 11 L. D. 250.

520. Extra-lateral rights to work a lode other than the one specifically located are governed by the end lines as located in the same manner as the extra-lateral rights to work the lode located. Walrath v. Champion M. Co., 63 Fed. Rep. 552.

521. If the lode leaves the location at a point on a side line, the right to follow it on its strike ceases at the point of intersection of the lode with the side line. Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282; Johnson v. Buell, 4 Colo. 557; 9 Mor. Min. Rep. 502.

522. Where separate applications and entries are made for the several locations surveyed as one claim, the claimant may file a new application for the consolidated claim and make a new entry therefor, *nunc pro tunc*. F. A. Williams, 15 L. D. 532.

523. The quantity of ground a miner can claim by location, or prior appropriation for mining purposes, may be limited by the min-

ing rules of the district; but such rules cannot limit the quantity of ground or the number of claims a party may acquire by purchase. Presser v. Parks, 18 Cal. 47 (1861); 4 Mor. Min. Rep. 452.

524. A vein can only be located by means of a surface claim, and held only to the extent that it is included within the surface lines (except rights to follow it on its dip). Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

525. In the absence of local regulations the quantity of mining ground which may be located is restricted to a reasonable area. This question will be determined by the general usages and customs prevailing upon the subject. Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198 (1862); 9 Mor. Min. Rep. 457.

526. The length of a location made under the act of 1866 may be that allowed by said act; but the width of surface ground patented may not exceed three hundred feet on each side of the middle of the vein, under section 2320, United States Revised Statutes, act of 1872. Lakin v. Roberts (Dolly), 53 Fed. Rep. 333; 54 Fed. Rep. 461; also, 7 U. S. App. 539.

527. The Montana statute of 1864, allowing surface ground fifty feet on each side of the lode, is construed as meaning fifty feet on each side the inclosing walls of the lode, allowing the width of the claim to be one hundred feet plus the width of the lode. Foote v. National M. Co., 2 Mont. 402; 9 Mor. Min. Rep. 605.

528. When no mining regulations or customs are in force in a district where a mining claim is located, general customs then in force may be given in evidence upon the question of the reasonableness of its extent. A general uniform custom should be proved if one exists. Table Mtn. Tunnel Co. v. Stranahan, 31 Cal. 387 (1865); 20 Cal. 198; 9 Mor. Min. Rep. 457.

529. A location of a lode need not be a parallelogram, but may follow the course of the lode, whether that be straight or tortuous. (This principle, applied to the facts in this case, gives a decision contrary to the case of Iron S. M. Co. v. Elgin M. & Sm. Co., 118 U. S. 196; 15 Mor. Min. Rep. 641.) Breece M. Co., 3 L. D. 11. See, to the same general effect, Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282. *Contra*, Albert Johnson, 7 C. L. O. 35.

530. A lode claim may not exceed in length the lode on which it is located. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

531. The lode located constitutes the measure of the locator's right to surface ground, and if it terminates at any point within the location or departs from the claim, the location beyond that point is defeasible if not void. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542; Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.) Zollars & Highland Chief Cons. M. Co. v. Evans, 3 McCrary, 39; 5 Fed. Rep. 172; 4 Mor. Min. Rep. 407.

532. Mining district regulations may restrict placer locations to eighty rods in length. Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324.

533. A mineral patent issued after May 10, 1872, could not convey more than three hundred feet of surface on each side of the lode applied for, even though the location was made under a law which allowed more than that width of surface ground. Lakin v. Roberts (Dolly), 7 U. S. App. 539 (on appeal from 53 Fed. Rep. 333, and 54 Fed. Rep. 461, on review).

534. The measurement of the width of a mining claim should begin from the outer walls of the lead, and not from the center of the lead itself (act of Montana, 1864). But see section 2320, United States Revised Statutes. Foote v. National M. Co., 2 Mont. 402; 9 Mor. Min. Rep. 605.

535. The "line of the tunnel," as used in section 2323, United States Revised Statutes, means the space between the lines of the sides of tunnel, protracted, not the entire width of the tunnel location. Corning Tunnel & M. Co. v. Pell, 4 Colo. 507; 14 Mor. Min. Rep. 612.

536. Section 2323, United States Revised Statutes, does not authorize the location as a tunnel claim of a tract of land fifteen hundred feet by three thousand feet. Corning Tunnel & M. Co. v. Pell, 4 Colo. 507; 14 Mor. Min. Rep. 612.

537. From the time of location of a tunnel claim under section 2323, United States Revised Statutes, and during work therein, the locator has an inchoate right to all blind lodes on the line of the tunnel, within three thousand feet of its face, that were not dis-

covered at date of location of the tunnel claim, contingent on discovery of said lode in the tunnel on development. Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. Rep. 200.

538. All locations made within a tunnel claim subsequent to its location are subject to the inchoate rights of the tunnel claimant. Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. Rep. 200.

539. A statute (Colorado) limiting the length of locations on tunnel discoveries to two hundred and fifty feet on each side of the tunnel is not in conflict with the United States laws. Rico-Aspen Cons. M. Co. v. Enterprise M. Co., 53 Fed. Rep. 321.

540. A tunnel location five thousand feet long is not void because it covers more than three thousand feet in length, but would be good to the extent of three thousand feet at least. Glacier Mtn. S. M. Co. v. Willis, 127 U. S. 471.

541. The first locator, having the apex of the vein entirely within the surface lines of his claim for a portion of its length, and for the remaining portion partly within and partly without his claim and within the surface lines of another claim, but never entirely departing from such first location, owns the entire lode within the end lines of his claim. Bullion-Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 3; 11 Pac. Rep. 515.

542. "The line of location includes the surface ground and the vein or lode, and measures the extent of the miner's right." A location is of surface ground as well as of the vein or lode. McCornick v. Varnes, 2 Utah, 355; 9 Mor. Min. Rep. 505.

543. The boundaries of a location may not be changed so as to interfere with prior acquired rights. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

544. When a party has the means of ascertaining a boundary line he is guilty of negligence in not ascertaining its location if knowledge thereof is essential to the preservation of his rights. Maye v. Yappen, 23 Cal. 306 (1863).

545. Where parties show that they were not discoverers, only two hundred feet to each locator could be taken under the mining act of July 26, 1866. Shoo Fly Lode v. Mono Lode, 1 C. L. O. 135.

546. "The miner having located his claim, is to be treated as an express licensee of the United States and independent of a purchase from the government of his mining claim, he has, upon compliance with the terms of the act, a right to appropriate the minerals therein contained. A title in fee by patent is offered him, which he may at his pleasure accept or reject." There is no time prescribed within which he shall apply for a patent. Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

547. Locators of mining claims, so long as they comply with the law, have "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations." This is a right of property, and the claimant must protect himself from trespassers by proceedings in court. Lewis Smith, 1 L. D. 615.

548. One who makes a valid mining location acquires thereby a *vested* right (conditional on continued compliance with the law) to the exclusive right of enjoyment of all the surface included therein. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Merced M. Co. v. Fremont, 7 Cal. 317 (1857); Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Atkins v. Hendree, 1 Idaho, 95; 2 Mor. Min. Rep. 328; Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196; Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. Rep. 714; Russell v. Chumasero, 4 Mont. 309; 1 Pac. Rep. 713; 15 Mor. Min. Rep. 508; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795; Blake v. Butte S. M. Co., 2 Utah, 54; 9 Mor. Min. Rep. 503; Fort Maginnis Case (Opp. Atty. Gen.), 1 L. D. 552; Lewis Smith, 1 L. D. 615; Branagan v. Dulaney, 2 L. D. 744; Cordell Placer, 4 L. D. 476; John U. Gabathuler, 15 L. D. 418; Piru Oil Co., 16 L. D. 117.

549. Under act of 1866 (14 Stat. 251) the locator of a gold or silver lode is its owner against everybody except the United States, and has a right to purchase — a pre-emption right. 420 Mining Co. v. Bullion M. Co., 3 Sawy. 634; 9 Nev. 240; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

550. "When one has discovered a vein and has complied fully with the law in locating a claim thereon, the territory inclosed within his surface boundaries is segregated

from the public domain in so far as all parties except the government, are concerned. . . . The prospector cannot go within such surface boundaries to prospect for mineral veins, and his act, if he do so, is as much trespass as though the land was patented." Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

551. A mineral location, under which all requirements of the law had been fairly met prior to the act of March, 1883, opening Alabama mineral lands to disposal as agricultural lands, confers a vested right that is not impaired by the provision of said act. Cordell Placer Mine, 4 L. D. 476.

552. Mining claims held by possessory title are property in the fullest sense of the word, and may be sold, transferred, mortgaged and inherited, and a location made in accordance with law has the effect of a grant by the United States of the right of present and exclusive possession. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183; Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510. (See 8 Mont. 65.) Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611; Manuel v. Wulff, 152 U. S. 505; Sullivan v. Iron Silver M. Co., 143 U. S. 431.

553. "A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located." Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795; Branagan v. Dulaney, 2 L. D. 744.

554. The Land Department cannot include in a town site patent any mine, mining claim or possession. If such is included in the patent, the same to that extent is void. Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574.

555. The Land Department cannot except any part of the surface ground from the patent of a mining claim based on a prior location. If it does, its act to that extent is void, and it may be so declared in an action at law. Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574.

556. A location of a mining claim in accordance with law confers a vested right of property which will except the land located from the operation of a subsequent reservation. John U. Gabathuler, 15 L. D. 418.

557. Lands of the United States in which miners have vested rights cannot be taken for public use without just compensation. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

558. A legally made location of a mining claim gives the locator a perfect possessory title to the claim located. Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

559. Proof of a legal location of a mining claim and of possession thereof is proof of such title as may be overthrown only by proof of forfeiture of the claim by failure to make the required annual expenditure thereon. Hammer v. Garfield M. & M. Co., 130 U. S. 291.

560. "A location since the 10th day of May, 1872, based on a discovery made within the limits of a claim properly located, and not abandoned or lost by failure to perform the labor thereon required by law, is an invalid location; for by the provisions of section 2322, the locator of such claim has the exclusive right of possession and enjoyment of all the surface included within the lines of the location, 'and of all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside of surface lines.' If the locator then has the exclusive right of the possession and enjoyment, how can a prospector go on such claim and make a valid discovery?" Branagan v. Dulaney, 2 L. D. 744.

561. A valid location is the inception of a grant from the United States, the patent being the consummation, and the property located may not be sold by the United States unless forfeited. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291.

562. "It [the title of a locator] is a title given by an act of Congress, and hence equivalent to a patent of the United States." Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

563. Under the mining laws of Congress, every valid location of a mining claim is ac-

companied by the right to the exclusive possession and enjoyment of the soil of such claim. This right is not a mere easement. Upon complying with the terms and conditions of said laws, the locator may have an absolute conveyance of the property. Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

564. A location excepts the mining claim from the public domain as by a grant. Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076.

565. The right to occupy, explore and extract the precious metals in mineral lands of the United States becomes vested in the party who locates these lands according to the local rules and customs of the mining district in which they are situated. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

566. Mere possession of mineral lands not based on a location is good as against one having no better title; but such possession must be actual and will not extend constructively to the full extent of a mining claim. Zollars & Highland Chief Cons. M. Co. v. Evans, 2 McCrary, 39; 4 Mor. Min. Rep. 407.

567. The right to the exclusive possession of mineral land not actually held in *possessio pedis* may be acquired only by a legal location thereof. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304. (Second trial, 17 Colo. 243; 29 Pac. Rep. 173.)

568. Ground actually held and possessed by right of discovery, even though not located, is reserved from location by a subsequent discoverer. Faxon v. Barnard, 2 McCrary, 44; 4 Fed. Rep. 702; 1 Colo. Law Rep. 147; 9 Mor. Min. Rep. 515.

569. Mere possession of mining ground without location is good as against an intruder who made no location. English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202; Gregory v. Pershbaker, 73 Cal. 109; 14 Pac. Rep. 401; 15 Mor. Min. Rep. 602; Neuebaumer v. Woodman, 89 Cal. 310; 26 Pac. Rep. 900.

570. Mere possession of mineral land not based on a location is good title as against a mere intruder, but not against one who has made a location of the land in the manner prescribed by law, and the possession of such locator may prevail over such prior possession. Garthe v. Hart, 73 Cal. 541; 15 Pac. Rep. 93; 15 Mor. Min. Rep. 492. (Citing Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65; Atwood v. Fricot, 17 Cal. 37; 2 Mor. Min. Rep. 75; English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202; Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217; Du Prat v. James, 65 Cal. 555; 3 West Coast Rep. 108; 4 Pac. Rep. 562; 15 Mor. Min. Rep. 341; Horswell v. Ruiz, 67 Cal. 111; 7 Pac. Rep. 197; 15 Mor. Min. Rep. 488; Neuebaumer v. Woodman, 89 Cal. 310; 26 Pac. Rep. 900; Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287; Noyes v. Black, 4 Mont. 527; 2 Pac. Rep. 769; Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; Patterson v. Tarbell, 26 Oreg. 29; 37 Pac. Rep. 76.)

571. Occupancy of land for mining purposes will prevent a valid location thereof. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 503; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Armstrong v. Lower, 6 Colo. 581; 15 Mor. Min. Rep. 458. (Affirming 6 Colo. 393; 15 Mor. Min. Rep. 631.) Weise v. Barker, 7 Colo. 178; 2 Pac. Rep. 919; 2 West Coast Rep. 108; Eilers v. Boatman, 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462. See 111 U. S. 356; 15 Mor. Min. Rep. 471.

572. Possession under color of title for the period prescribed by the statute of limitations raises the presumption of a legal location, and an adverse location made during such possession is invalid. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178.

573. One in the actual possession of real estate may rely on possession alone until his adversary shows a better title. Hawxhurst v. Lander, 28 Cal. 331; 12 Mor. Min. Rep. 214.

574. Two kinds of possession of mining ground are recognized: 1st. That of mere actual occupation independent of a location, which is good as against one having no better title. 2d. That given by compliance with the law regarding location. In the first the occupation must be an actual *possessio pedis;* in the second it may be constructive. Armstrong v. Lower, 6 Colo. 581; 15 Mor. Min. Rep. 458. (Affirming 6 Colo. 393; 15 Mor. Min. Rep. 631.)

575. Mere possession of mineral lands is not equivalent to a location. Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291.

576. Legal possession of a mining claim must be based on a legal location thereof. Sweet v. Webber, 7 Colo. 443; 4 Pac. Rep. 752; 4 West Coast Rep. 116.

577. One claiming a mining claim beyond a *possessio pedis* must show a constructive possession which must result either from a compliance with the laws governing locations of mining claims or by physical works or monuments. Roberts v. Wilson, 1 Utah, 292; 4 Mor. Min. Rep. 498.

578. Discovery with possession but without location is not valid as against a subsequent peaceable location. Horswell v. Ruiz, 67 Cal. 111; 7 Pac. Rep. 197; 15 Mor. Min. Rep. 488; Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429. *Contra*, Phenix M. & M. Co. v. Lawrence, 55 Cal. 143; 12 Mor. Min. Rep. 261.

579. A *possessio pedis* of mining land is good as against a mere trespasser, but, in absence thereof, claimant must show a legal location to succeed in a suit against a trespasser. Funk v. Sterrett, 59 Cal. 613.

580. Possession of a mining claim, to be of effect, must be that arising from a compliance with the law. Possession without location carries no title, nor does possession under a location which has not been properly maintained. "The mere naked possession of a mining claim upon the public lands is not sufficient to hold such claim as against a subsequent location, made in pursuance of the law, and kept alive by compliance therewith." Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287; McKinstry v. Clark, 4 Mont. 370; 1 Pac. Rep. 759; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291.

581. Long continued, undisputed possession of a mining claim may raise a presumption that it was based upon a valid location. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178; Atwood v. Fricot, 17 Cal. 38; 2 Mor. Min. Rep. 305; Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217.

582. A location made by a trespasser is invalid. Aurora Hill Cons. M. Co. v. 85 Mining Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581.

583. A tortious entry is unavailing for the purpose of a valid location of a claim. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65.

584. A location of land covered by a prior subsisting location is void. Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 183.

585. Patent relates back to date of location. Taylor v. Brown, 5 Cranch, 234; Henshaw v. Bissell, 18 Wall. 266; Deffeback v. Hawke, 115 U. S. 392; Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683; 61 Fed. Rep. 557; 7 U. S. App. 463; 9 U. S. App. 613; 54 Fed. Rep. 284; Eureka Cons. M. Co. v. Richmond M. Co. (Eureka Case), 4 Sawy. 302; 9 Mor. Min. Rep. 578; Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345; Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645.

586. A patent relates back to the location so as to cut off intervening adverse rights. Heydenfeldt v. Daney G. & S. M. Co., 93 U. S. 634; 13 Mor. Min. Rep. 204; Last Chance M. Co. v. Tyler M. Co., 15 U. S. App. 456; Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858.

586a. The issuance of patent evidences discovery, proper location, marking, posting of notice, recording thereof, requisite expenditure, notice of application, and that all other steps to acquire patent, required by law, were regularly taken. Stark v. Starr, 6 Wall. 418; Last Chance M. Co. v. Tyler M. Co., 15 U. S. App. 456; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434. (St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673, to the same effect.)

586b. After issuance of patent to a mining claim, the sufficiency of the location notice cannot be questioned. Chambers v. Jones, 17 Mont. 156. (Citing and quoting approvingly Talbott v. King, 6 Mont. 131.)

587. A patent for a mining claim located by the register of a local land office may issue to his grantee who took in good faith and who has complied with the law. (No opinion expressed as to the legality of such a location.) Rust & Criteser, 2 L. D. 754.

588. The owner of a lode claim owns all lodes whose apexes are in his side lines. A subsequent locator who locates across the first claim has no right to take ore from the first location. Watervale M. Co. v. Leach, 33 Pac. Rep. 418 (Arizona); Wilhelm v. Sylvester,

101 Cal. 358; 35 Pac. Rep. 997. *Contra*, Branagan v. Dulaney, 8 Colo. 408; 8 Pac. Rep. 669; Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77. (Affirmed in 13 Colo. 174; 22 Pac. Rep. 436.) Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 589.

589. One owning a lode claim is presumed to own all mineral therein till some one else shows good title thereto by virtue of a location on the apex of a lode dipping under the claim. Jupiter M. Co. v. Bodie M. Cons. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

590. The act of May 10, 1872, gives a locator the exclusive right to the surface of his claim, and "not only the particular lode or vein located, but to all other veins, lodes and ledges, the top or apex of which lies within the surface lines of his location, with the right to follow such veins, lodes or ledges to any depth." Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 9 Mor. Min. Rep. 578; Iron Silver M. Co. v. Cheesman, 2 McCrary, 191; 9 Mor. Min. Rep. 552.

591. "When one has discovered a lode upon the unappropriated public domain, and has, within the proper time, in good faith, performed all the subsequent acts essential to a valid location, as provided by law, he is entitled to the presumption that his lode extends throughout the full length of the claim" (as against another lode claimant). The burden of disproving this is upon the one denying it. Armstrong v. Lower, 6 Colo. 581; 15 Mor. Min. Rep. 458. (Affirming 6 Colo. 393; 15 Mor. Min. Rep. 631.) Patterson v. Hitchcock, 8 Colo. 533; 5 Mor. Min. Rep. 542.

592. A prior locator of a mining claim on the banks of a stream has the right to use the bed for working his claim, and any subsequent embankment or dam which interferes with his use is an encroachment upon his rights, and he is entitled to recover. Sims v. Smith, 7 Cal. 148 (1857).

593. The rules and customs which point out the manner of locating mining claims are conditions precedent, which must be substantially complied with. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

594. The grantor of a mining claim is estopped from alleging that he had no legal location at date of sale. Belcher Cons. G. M. Co. v. Defferrari, 62 Cal. 160; Stinchfield v. Gillis, 96 Cal. 33; 30 Pac. Rep. 839; S. C., 107 Cal. 84; 40 Pac. Rep. 98.

595. The grantor of a mining claim may be called as a witness to prove the invalidity of the location of the claim sold. Johnson v. Parks, 10 Cal. 446; 4 Mor. Min. Rep. 316.

596. Possession is sufficient to maintain title during the period necessary to perfect the location. Erhardt v. Boaro, 113 U. S. 527; 4 Mor. Min. Rep. 432; Crossman v. Pendery, 2 McCrary, 139; 1 Colo. Law Rep. 496; 4 Mor. Min. Rep. 431.

597. A locator with color of title may hold against one having no better title. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178.

598. Where a claim is recognized for years by neighboring claimants, a formal location need not be proven. Kinney v. Cons. Virginia M. Co., 4 Sawy. 382; 10 Mor. Min. Rep. 457.

599. Where each of several locators claims a distinct portion of a fifteen hundred foot claim, each of such portions is a separate claim and must be located and developed as such. Zeckendorf v. Hutchison, 1 New Mex. 476; 9 Mor. Min. Rep. 483.

600. One holding a mining claim under a location may sue in trespass one who removes timber from the claim. McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076.

601. A purchaser may have a better right than his grantor, the locator, as against other citizens seeking to locate the same ground. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178.

602. The owner of a mining claim has a *prima facie* right to all minerals within the surface lines of his location. Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662; 23 Pac. Rep. 547.

603. A location made on a discovery claim of another before the time has expired within which the first discoverer must complete his location, is invalid. Craig v. Thompson, 10 Colo. 517; 16 Pac. Rep. 24.

604. A location on the surface based on a tunnel discovery will relate back to the location of the tunnel claim, and cut out an intervening surface location on the same lode.

Rico-Aspen M. Co. v. Enterprise M. Co., 53 Fed. Rep. 321.

605. A second location made by the original locators and others does not necessarily operate as an abandonment of the first location. Weill v. Lucerne M. Co., 11 Nev. 200; 3 Mor. Min. Rep. 372.

606. The owner of a valid location is entitled to its exclusive use and possession, and a stranger who enters thereon for the purpose of mining, cutting timber, or otherwise interfering with the owner's use or possession, is a trespasser. Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

607. A locator's possessory right is subject to taxation. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183; State v. Moore, 12 Cal. 56; 14 Mor. Min. Rep. 110; Hale & Norcross G. & S. M. Co. v. Storey County, 1 Nev. 104; 14 Mor. Min. Rep. 115; Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240.

608. The purchaser of a mining location who relocates substantially the same ground is entitled to the benefit of work done on the ground by his grantor. Tam v. Story, 21 L. D. 440.

609. The act of 1866 (sec. 2329, U. S. Rev. Stat.) does not grant to ditch owners on the public land any right not recognized and acknowledged by local customs, laws and decisions of the courts, and does not authorize the construction of a ditch across the prior mining location of another. Titcomb v. Kirk, 51 Cal. 288; 5 Mor. Min. Rep. 10. (Affirmed in Jennison v. Kirk, 98 U. S. 453; 4 Mor. Min. Rep. 504.)

610. A location upon land covered by a prior location is invalid. Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 183.

611. "A location to be effectual must be good at the time it was made." Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65; Upton v. Larkin, 5 Mont. 600; 6 Pac. Rep. 66; S. C., 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

612. A mining location, invalid when made, by reason of the land being reserved, is a nullity and no rights can be claimed under it, even after the reservation is thrown open. Kendall v. San Juan S. M. Co., 9 Colo. 349; 12 Pac. Rep. 198.

613. All of the necessary acts must be performed before a legal location exists. Gonu v. Russell, 3 Mont. 358; 12 Mor. Min. Rep. 630.

614. The right to a mining claim vests by the taking thereof in accordance with local rules. McGarrity v. Byington, 12 Cal. 426; 3 Mor. Min. Rep. 311 (1859); Dutch Flat Water Co. v. Mooney, 12 Cal. 534 (1859).

615. The law does not make actual possession necessary for the protection of the title acquired by a valid location. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65.

616. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65.

617. The acts required as evidence of possession of mining claims are those usually done. A miner may hold possession by his agents or servants. English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202; Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 663.

618. The title acquired by a valid location is presumed to continue in the absence of allegation and proof to the contrary. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

619. The valid location of a mining claim is a grant from the government to the person making the location. The location is the inception of the grant and the patent is its consummation. The grant is kept alive by representation (work). A failure to represent forfeits the grant and makes void the title acquired by location, and the ground thereupon becomes again subject to location and purchase. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

620. Where a junior location overlaps a senior location it is not validated as to the conflicting ground by the abandonment of the senior location. In order to secure a right to such ground, the junior locator must relocate it. Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

621. A. takes possession of mineral land but does not locate. B. makes a location of the land. A. has no rights as against the location of B. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65; Chap-

man v. Toy Long, 4 Sawy. 28; 1 Mor. Min. Rep. 497; Morenhaut v. Wilson, 52 Cal. 263; 1 Mor. Min. Rep. 53; Horswell v. Ruiz, 67 Cal. 111; 7 Pac. Rep. 197; 15 Mor. Min. Rep. 488; Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153. (See 130 U. S. 291.) Patterson v. Tarbell, 26 Oreg. 29; 37 Pac. Rep. 76; McCornick v. Varnes, 2 Utah, 355; 9 Mor. Min. Rep. 505.

622. "A subsequent locator cannot object that all steps necessary to a valid location of the mining claim were not performed at the time of its location, provided they were afterwards performed before other rights attached." North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Zollars & Highland Chief Cons. M. Co. v. Evans, 2 McCrary, 39; 4 Mor. Min. Rep. 407; Faxon v. Barnard, 2 McCrary, 44; 1 Colo. Law Rep. 147; 9 Mor. Min. Rep. 515; McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

623. A location based upon a discovery tunnel not on the claim is invalid. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

624. The locator of a lode has no right to work another lode which dips under his claim without regard to whether or not the right to work it belongs to any other person. Montana M. Co. v. Clark, 42 Fed. Rep. 626.

625. The first locators of mining ground can work the mine with reasonable care and diligence; but a mining custom which would allow the total destruction of a junior location on ground which was vacant, in a gulch below the prior location, cannot be maintained under any statute or common mining law. Lincoln v. Rogers, 1 Mont. 217 (1870).

626. One who locates a claim in the names of himself and others, even without their consent, makes such others co-owners with himself, and cannnot deprive them of their interests by destroying the location notice and posting a new one, omitting their names. Morton v. Solambo M. Co., 26 Cal. 527; 4 Mor. Min. Rep. 463.

627. If land is claimed under the mineral land laws at date of definite location of the Northern Pacific Railroad Company, the land so claimed is excepted from the grant to the company, even though said claim is subsequently shown to be invalid. N. P. R. R. Co. v. Sanders, 49 Fed. Rep. 129.

628. In order to entitle a locator to follow the lode on its dip into the claim of another, the continuity of a body of ore from the apex which has been located to the point in controversy must be shown. Iron Mine v. Loella Mine, 2 McCrary, 121; 3 Fed. Rep. 368; 1 Colo. Law Rep. 16. (Also reported as Iron S. M. Co. v. Murphy, 1 Mor. Min. Rep. 548.)

629. After a legal location neither a continuous actual occupation nor a *possessio pedis* are necessary to retain possessory title. Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 663; English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202.

630. Locations of lodes or veins within placer claims, prior to application for placer patent, when perfected under the law, are the property of the locators or their assigns, and are not, therefore, subject to disposal by the government. Sullivan v. Iron Silver M. Co., 143 U. S. 431. (Citing and quoting Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510.)

631. The legal location of a placer mining claim will not prevent the location of lode claims therein by other persons at any time previous to application for patent for the placer. Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 L. D. 95.

632. Possessory title to a mining claim is real estate, and must be conveyed by deed. It is a grant by the government to the locator of an interest in the public domain, and the thing granted must be real estate. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196; Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287. (Distinguishing Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198; 9 Mor. Min. Rep. 457.)

633. Compliance with miners' regulations and customs in force is necessary to the validity of a location. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304 (second trial, 17 Colo. 243; 29 Pac. Rep. 173); Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487; Cons. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

634. A location must be made in compliance with the United States laws and with

miners' rules and regulations. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

635. Mining rules and regulations of a district (1865) govern the location of claims and maintenance thereof and must be followed. Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188; 1 Mor. Min. Rep. 17.

636. Before statutory enactment, the manner of locating mining claims and maintaining such locations was governed by miners' rules and customs, and compliance therewith was necessary to constitute a valid location or to maintain one. Cons. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

637. Failure to comply with local mining regulations may be shown by protest or adverse claim; but does not afford ground for proceeding against the patentee by the government where no conflict with the general law appears. Robert Hawke, 14 C. L. O. 151.

638. Local laws cannot impose conditions on the taking of mineral lands not authorized by United States laws. Wight v. Taber, 2 L. D. 738.

639. Local customs discussed. Jennison v. Kirk, 98 U. S. 453.

640. The size of a placer claim located prior to the act of July 9, 1870, is regulated by the local laws. Com'r to H. F. Page, 1 C. L. O. 134.

641. A mining district is not necessarily an organized one. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

642. A location is void if the district laws are not complied with. Thomas Taylor, 9 C. L. O. 52.

643. A mining location in conflict with the local law is illegal. Andrew Chavanne, 7 C. L. O. 115.

644. An adverse complaint must allege location to have been made in accordance with mining district rules, and proof of compliance with them must be made. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304; Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487; Cons. Republican Mountain M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

645. Where there are no State or Territorial laws, the rules and customs among the miners will govern the width of mining claims. South Comstock G. & S. M. Co., 2 C. L. O. 146. (Citing 420 M. Co. v. Bullion M. Co., 2 C. L. O. 5; Antelope, Prince of Wales & Wandering Boy Mines, 2 C. L. O. 2; Red Pine Mine, 1 C. L. O. 135.)

646. The local laws to be effective must be in force, and must not conflict with United States laws. The question as to whether mining district laws are in force is one of fact. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

647. Local laws in conflict with United States laws are ineffective. Original M. Co. v. Winthrop M. Co., 60 Cal. 631.

648. The top or apex of a vein must be found within the limits of a claim located to form the basis of a valid location; but such apex is not necessarily a point, but may be a line of great length, and if a portion of it is discovered within the claim, that is sufficient upon which to base a valid location. Larkin v. Upton, 144 U. S. 19; S. C., 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; 5 Mont. 600; 6 Pac. Rep. 66.

649. When a vein or lode, located on the apex, passes on the dip outside the plane of the side lines extended vertically, and encroaches on another's vein, it must be shown that the vein passing outside the side lines is a continuation of the vein located in order to give the right to pursue it. Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

650. A subsequent locator on the apex of a lode has a right superior to that of a prior locator on the dip as to all of the lode located not embraced within the surface lines of such prior location on the dip. Iron Silver M. Co. v. Murphy (S. C., Iron Mine v. Loella Mine), 2 McCrary, 121; 3 Fed. Rep. 368; 1 Colo. Law Rep. 16; 1 Mor. Min. Rep. 548.

651. A location on the dip of a vein gives no right to follow the vein beyond the surface lines of the claim. Duggan v. Davey, 26 N. W. Rep. 887.

652. A mining claimant who claims the right to work a lode on the dip under the claim of another has the burden of proving the apex of such lode to be in a valid location owned by himself. Doe v. Waterloo M. Co., 54 Fed. Rep. 935; Duggan v. Davey, 26 N. W.

Rep. 887; Leadville M. Co. v. Fitzgerald, 4 Mor. Min. Rep. 380; Iron Silver M. Co. v. Elgin M. & Sm. Co., 118 U. S. 196; 15 Mor. Min. Rep. 641; Cheesman v. Shreeve, 37 Fed. Rep. 36. *Contra*, Montana Co. v. Clark, 42 Fed. Rep. 626.

653. The question as to relative rights of claimants to follow a lode on the dip is one of priority of location under section 2336, United States Revised Statutes. Tyler M. Co. v. Sweeney, 54 Fed. Rep. 284; 4 U. S. App. 329.

654. A junior locator on the apex may not enter a senior location on the dip. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 8 Fed. Rep. 725; 4 Mor. Min. Rep. 441.

655. A subsequent location on the dip is invalid as against a prior location on the apex. Pardee v. Murray, 4 Mont. 284; 2 Pac. Rep. 16; 15 Mor. Min. Rep. 515.

656. Where two veins, each located and owned by the same person, unite on the dip, the lode below the point of union goes with the title to the senior location, and if below that point it unites with still another lode, the point to decide would be, which was first, the senior location of the first party or the location of such other lode. Little Josephine M. Co. v. Fullerton, 19 U. S. App. 190; 58 Fed. Rep. 521.

657. Section 2336, United States Revised Statutes, was not intended to limit or define the rights of a person in mere possession of a tract of mining ground where there is more than one vein, or to prescribe the effect of a conveyance by the locator of a claim of a portion of his location containing one of such veins. The objects of the statute were to supplement the provision of section 2332, and to prescribe rules under which different locations by different proprietors should be held, and to determine the rights of such proprietors in case of intersecting veins. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98; S. C., 96 Cal. 33; 30 Pac. Rep. 839.

658. In a controversy as to ownership of the vein on the dip, issuance of patent does not prove the correctness of the Land Department records as to date of location, but this must be proven as any other matter would be. Champion M. Co. v. Cons. Wyoming G. M. Co., 75 Cal. 78; 16 Pac. Rep. 513; Last Chance M. Co. v. Tyler M. Co., 61 Fed. Rep. 557; 9 U. S. App. 613; Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 345.

659. Although the act of 1872 enlarges the right of a locator by a grant of all veins, lodes and ledges the top or apex of which lie within his surface lines, his right to surface ground and to other lodes is dependent upon the principal lode, the one forming the basis of the location. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

660. Under section 2322, United States Revised Statutes, the locator of a mining claim on the apex of a lode may follow the lode on its dip, even though it dips into a claim held under a senior patent. Colorado Central Cons. M. Co. v. Turck, 50 Fed. Rep. 888; 4 U. S. App. 290; 12 U. S. App. 85; Iron Mine v. Loella Mine, 2 McCrary, 121; 3 Fed. Rep. 868: 1 Colo. Law Rep. 16. (Also reported as Iron S. M. Co. v. Murphy, 1 Mor. Min. Rep. 548.)

661. The locator on the dip of a lode has no right as against a locator on the apex, the dates of respective patents being immaterial. Colorado Central Cons. M. Co. v. Turck, 50 Fed. Rep. 888; 4 U. S. App. 290; 12 U. S. App. 85; Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

662. When veins cross, the prior locator need not adverse to secure his rights to the vein at the point of intersection; but by failure to adverse he loses surface rights. When two veins join on the strike there must be surface conflict. *Hence*, the rules as to surface conflicts apply to conflicts between cross-lodes. Lee v. Stahl, 13 Colo. 174; 22 Pac. Rep. 436. (Affirming S. C., 9 Colo. 408; 11 Pac. Rep. 77.) Morgenson v. Middlesex M. & M. Co., 11 Colo. 176; 17 Pac. Rep. 513.

663. Where a vein outcrops in two mining claims the first locator has the better right. Argentine M. Co. v. Terrible M. Co., 122 U. S. 478.

664. A lode claimant has no right to follow his lode on its dip under an agricultural claim which was entered prior to the location of the mining claim. Colorado Central Cons. M. Co. v. Turck, 50 Fed. Rep. 888; 4 U. S. App. 290; 12 U. S. App. 85; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348; Amador-Medean G. M. Co. v. South Spring Hill G. M. Co., 13 Sawy. 523; 36 Fed. Rep. 668.

665. "Whether the *ore* is loose and friable, or very hard, if the inclosing walls are country rock, it may be located as a vein or lode. But if the ore is on top of the ground, or has no other covering than the superfi-

cial deposit, which is called alluvium, diluvium, drift or debris, it is not a lode or vein within the meaning of the act, which may be followed beyond the lines of the location." Tabor v. Dexter, 9 Mor. Min. Rep. 614.

666. Each locator is entitled to follow the dip of his lode or vein to an indefinite depth, though it carries him outside of the side lines of his location; but this right is based on the hypothesis that the side lines substantially correspond with the course of the lode or vein at the surface; and it is bounded at each end by the end lines of the location crossing the lode or vein, and extended perpendicularly downward indefinitely in their own direction. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

667. A locator working subterraneously into the dip of a vein belonging to another locator, who is in possession of his location, is a trespasser, and liable to an action for taking ore therefrom. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

668. "Under Secs. 2322, and 2336, U. S. Rev. Stat., when a junior mining location crosses a senior location, and the veins therein are cross veins, the junior locator is entitled to all the ore found in his vein within the side lines of the senior location, except at the space of intersection. In such a case a junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross veins." Branagan v. Dulaney, 8 Colo. 408; 8 Pac. Rep. 669; Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77; Pardee v. Murray, 4 Mont. 234; 2 Pac. Rep. 16; 15 Mor. Min. Rep. 515; Morgenson v. Middlesex M. & M. Co., 11 Colo. 176; 17 Pac. Rep. 518. *Contra*, Watervale M. Co. v. Leach, 33 Pac. Rep. 418 (Arizona); Wilhelm v. Sylvester, 101 Cal. 358; 35 Pac. Rep. 997.

669. A location of a mining claim upon a lode or vein of ore should be laid along the same lengthwise of the course of its apex, as well under the mining act of 1866 as under that of 1872. If located otherwise the location will only secure so much of the lode or vein as it actually covers. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607; McCornick v. Varnes, 2 Utah, 355; 9 Mor. Min. Rep. 505; Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

670. If a claim is located across instead of along the lode, the side lines become the end lines for the purpose of bounding the right to follow the lode on its dip. Tyler M. Co. v. Last Chance M. Co., 157 U. S. 683. (See 54 Fed. Rep. 284; 61 Fed. Rep. 463; 7 U. S. App. 463.) Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

671. A location is not good beyond the point where the lode upon which it is based departs from the claim. Johnson v. Buell, 4 Colo. 557; 9 Mor. Min. Rep. 502; Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

672. If a lode departs from the side line of a claim, the claimant may voluntarily abandon his claim beyond the point of such departure and establish an end line at that point. Last Chance M. Co. v. Tyler M. Co., 15 U. S. App. 456. (See 157 U. S. 683.)

673. Where the vein crosses the side line of a location the strike is terminated by the plane of such side line, and the right to follow the vein on its dip is determined by a vertical plane parallel to the end lines, drawn downward, and which takes effect at the point where the apex intersects the side line. King v. Amy & Silversmith Cons. M. Co., 9 Mont. 543; 24 Pac. Rep. 200. (Reversed, 153 U. S. 222.)

674. The purchaser of a lode claim from a prior locator is entitled to all the mineral veins and lodes in such claim, and to the benefit of all expenditures made by his grantor in the development thereof; and the right to such benefit is not defeated by a subsequent amended location wherein the purchaser makes use of a discovery of his own within the limits of said purchase and on a junior location embraced for the greater part within the boundaries of said purchase. Tam v. Story, 21 L. D. 440.

675. An expenditure of $500 is required on every separate location of twenty acres or less of placer mines. Amendment to Circular of Sept. 22, 1882, 9 C. L. O. 168.

676. Five hundred dollars' expenditure is required on each claim, but not on each location embraced therein. Smith Brothers, 7 C. L. O. 4.

677. Where several contiguous claims held in common are embraced in one application for patent, an expenditure of $500 upon every one of such locations need not be shown if that sum has been expended upon some one or more thereof for the development of the

consolidated claim. Good Return M. Co., 4 L. D. 221.

678. Labor and improvements, within the meaning of the statute, are deemed to have been made on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, although such labor and improvements may not be upon the claim. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Jackson v. Roby, 109 U. S. 440; De Noon v. Morrison, 88 Cal. 163; 23 Pac. Rep. 374.

679. Work done on a ditch outside of a placer claim, and prior to the location of the claim, cannot be considered as having been done for the benefit of the claim in the absence of a clear showing of such fact. Trickey Placer, 7 L. D. 52.

680. Local regulations requiring certain assessment work to be done on each location, held not to mean that it must be done on every two hundred feet of the entire claim, held by several persons, but on the whole claim, irrespective of the number of locations or feet. Leet v. John Dare S. M. Co., 6 Nev. 218; 4 Mor. Min. Rep. 487.

681. If plaintiffs perform the acts required by law to locate a quartz claim, except the labor, the year not having expired, and the defendants undertook to take possession of the ground, they were trespassers. Atkins v. Hendree, 1 Idaho, 95; 2 Mor. Min. Rep. 328.

682. A claim is an entirety, and it need not be shown that improvements are situate upon any particular portion of the claim where it has been enlarged by amendment of the location. Lincoln Placer, 7 L. D. 81.

683. The fact that a part of $500 expenditure was made on land before its location as a mining claim, while held under the agricultural law, does not affect the validity of an entry. Clark v. Taylor, 20 L. D. 455.

684. When work is resumed on an abandoned claim to avoid relocation by third parties, the work for the previous year, viz., $100 worth, should be done within a reasonable time or the claim may be relocated. Honaker v. Martin, 11 Mont. 91; 27 Pac. Rep. 397. (Refusing to follow Belcher Cons. M. Co. v. Defferrari, 62 Cal. 160. Citing Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65; Little Gunnell M. Co. v. Kimber, 1 Mor. Min. Rep. 536 (Colo.).

685. Labor may be done or improvements made on one of several locations for the development of the consolidated claim. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

686. Where several locations are embraced in one application for patent and an expenditure of $500 is not shown on each claim, it must be made to appear that $500 has been spent for the joint benefit of the various locations. Andromeda Lode, 13 L. D. 146.

687. A locator's only right to possession of a mining claim is conditional upon the performance annually of the required amount of labor; and if such labor is not performed the ground is subject to relocation under section 2324, United States Revised Statutes, and the occupation of the ground by the original owner will not prevent relocation. Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341. (Refusing to follow Eilers v. Boatman, 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462 (see 111 U. S. 356; 15 Mor. Min. Rep. 471); Weise v. Barker, 7 Colo. 178; 2 Pac. Rep. 919; 2 West Coast Rep. 108.)

688. Under miners' common law, previous to United States legislation, work was required to hold a location. Cons. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

689. Work done on the claim by one holding an equitable title is as effectual to maintain the location as if done by the legal owner. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

690. Failure to perform annual labor on the senior of two conflicting locations during the calendar year does not operate to vest title to the land in conflict in the owner of the junior location, who can secure the same only by a relocation made before resumption of work by the senior locator. Oscamp v. Crystal River M. Co., 19 U. S. App. 18.

691. Placer claims on surveyed land must be located by legal subdivisions or reason shown for failure to do so. S. P. R. R. Co. v. Griffin, 20 L. D. 485.

692. The location of a claim by legal subdivisions is valid even though erroneously described, providing the abutting legal subdivisions are correctly given. Duryea v. Boucher, 67 Cal. 141; 7 Pac. Rep. 421.

693. Placer claims may be located by legal subdivisional description, notwithstanding the suspension of the township survey by the Land Department. Gird v. California Oil Co., 60 Fed. Rep. 531.

694. A location of a placer claim by legal subdivisions must be made to conform therewith in the matter of exact description of the land as shown by the township plat. Fractional subdivisions designated by the United States Surveyor General as lots must be so described. Reins v. Murray, 22 L. D. 409.

695. Though placer claims on surveyed lands are required to conform "as near as practicable" with legal subdivisions, they may be located along a stream or canyon, as it is not the intent of the law to compel the placer claimant to take land unfit for mining. William Rablin, 2 L. D. 764.

696. Placer locations, under section 2329, United States Revised Statutes, may include all forms of deposit except quartz veins or other rock in place, and the Land Department has properly held that said section embraces quarries of rock valuable for building purposes. Freezer v. Sweeney, 8 Mont. 503; 21 Pac. Rep. 20.

697. To be excepted from a placer patent a lode need not have been located at date of the application for such patent. "It is enough that it be known, and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises," etc. Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394; Sullivan v. Iron Silver M. Co., 143 U. S. 431; Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591; Iron Silver M. Co. v. Reynolds, 124 U. S. 374; Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

698. One who locates a lode within a placer claim after publication of notice of placer application acquires no right to it, and (*semble*) he does not acquire any right if the location is made after the placer application. Montana Copper Co. v. Dahl, 6 Mont. 131.

699. After the issuance of a placer patent the Land Department will not assume that a lode was known to exist within the placer claim because of the fact that a lode claim was located therein prior to the placer application. The known existence of the lode at that date must be shown as a fact by proof. Valley Lode, 22 L. D. 317.

700. Where a mineral entry of a placer claim taken by legal subdivisions has been canceled as to that portion of the claim on which the discovery and improvements are situate, no further time will be allowed within which to make a discovery on every twenty-acre tract remaining, or to make an expenditure of $500 thereon, as the location of the claim without such discovery was invalid. Departmental decision of May 20, 1896, *In re* Eliza Sweeney.

701. After the issuance of a placer patent the owner of a lode therein, located with surface ground twenty-five feet on each side, may not so amend his location as to take in a greater amount of surface ground. Becker v. Sears, 1 L. D. 577.

702. A description of a bar placer claim, giving the name of the claim and of adjoining claims, size and location in a certain canyon, held to be sufficient. Grady v. Early, 18 Cal. 108; 12 Mor. Min. Rep. 104.

703. Section 2333, United States Revised Statutes, has no application to lodes or veins within the boundaries of a placer claim which had been previously located under the laws of the United States, and are in possession of the locators and their assigns. Sullivan v. Iron Silver M. Co., 143 U. S. 431. (Quoting Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611. Citing Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591; Iron Silver M. Co. v. Reynolds, 124 U. S. 374; Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611; Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394.)

704. The formal location of a lode is not necessary to exclude it from a placer patent, the only requisite to such exclusion by operation of law being: (1) That it was known to exist at date of application for the placer patent, and (2) that it was not included in such application. Railroad Lode v. Noyes Placer, 9 L. D. 26.

705. Proof of the location of a lode claim in a placer at the date of placer application for patent is not proof of the known existence of a lode. Butte & Boston M. Co. v. Sloan, 16 Mont. 97; 40 Pac. Rep. 217.

706. A vein or lode that has never been claimed; that has not been located; that has not been marked out by metes and bounds, and in which there has been no actual development, is not excepted from a placer application and patent. Iron Silver M. Co. v. Sullivan, 5 McCrary, 274; 16 Fed. Rep. 829.

707. A known vein, to be excepted from a placer patent, must possess qualities not required to render a vein subject to location under section 2320, United States Revised Statutes, *i. e.*, it must be capable of being profitably worked. Montana Central Ry. Co. v. Migeon, 68 Fed. Rep. 811.

708. The decision of the Department, *In re* Juniata Lode, 13 L. D. 715 (wherein the Department consented to accept a reconveyance of the part of a patented placer claim covered by a lode location, for the purpose of issuing patent for the lode claim without suit to vacate the placer patent), is not applicable where it is desired to allow a lode patentee to reconvey a tract for the purpose of giving an unpatented lode claim its discovery. Winter Lode, 22 L. D. 362.

709. One who locates a stone placer has title to all other minerals in the claim. Freezer v. Sweeney, 8 Mont. 508; 21 Pac. Rep. 20.

710. An individual owner of a placer claim may not, by making a relocation or amended or additional location, increase the area of his claim more than twenty acres, and if the additional area taken exceeds twenty acres, the additional location is void as to the excess. Joseph M. Knapp, 2 L. D. 763.

711. "Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode." Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

712. A failure to adverse a mineral application for patent is a waiver of all claim to the ground adverse to those of the applicant, and the fact that such adverse claims are based on the same locations as those of the applicant does not vary the rule. Nichols v. Becker, 11 L. D. 8.

713. After the allowance of entry, one who has failed to file an adverse claim will not be heard to attack the validity of the location of the claim entered because of his own prior location, as he should have asserted his rights in the manner prescribed by section 2326, United States Revised Statutes. Warren Mill Site v. Copper Prince Lode, 1 L. D. 555.

714. In an adverse suit, each party must prove his right to a patent by a compliance with the statutes, State and Federal, and miners' rules and regulations in force relative to location, in order to recover a judgment for the ground in controversy. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304. (Second trial, 17 Colo. 243; 29 Pac. Rep. 173.)

715. A mining location made a few days prior to the end of publication of notice of application will not sustain an adverse claim. Smead v. Deadwood M. Co., 7 C. L. O. 50.

716. The plaintiff in an adverse suit may show that the location of the claim applied for is invalid for the reason that the ground contained therein was embraced in a third claim in which neither party has or claims any interest. Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362; Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

717. A party claiming an equitable right only in a location cannot be considered an adverse claimant. Shoo Fly Lode v. Mono Mine, 1 C. L. O. 135.

718. The failure of the first locator to adverse the application for patent by the second locator is a waiver of priority. Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 9 Mor. Min. Rep. 578; Gustavus Hagland, 1 L. D. 591.

719. As between the conflicting locations made under the act of 1866, the act of 1872 would not operate to the injury of the owner of either. Blake v. Butte S. M. Co., 2 Utah, 54; 9 Mor. Min. Rep. 503.

720. As claims located prior to 1872 were for one vein only, an application for a claim in conflict with another need not be adversed by the owner of such other claim to protect his rights, if such claims were located on dif-

ferent lodes. Blake v. Butte S. M. Co., 2 Utah, 54; 9 Mor. Min. Rep. 503.

721. The allegation by a protestant that the location of a mining claim applied for was invalid because of conflict with a prior location of the protestant is simply the allegation of an adverse claim, which may be tried only in the manner prescribed by section 2326, United States Revised Statutes, in a court of competent jurisdiction. Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584; Gowdy v. Kismet G. M. Co., 22 L. D. 624.

722. When plaintiff's ownership and right of possession are put in issue by answer, he must show affirmatively a compliance with the act of Congress and local rules and regulations, and that he had thereby made a valid location. Garfield M. & M. Co. v. Hammer, 130 U. S. 291. See S. C., 6 Mont. 53; 8 Pac. Rep. 153.

723. A locator who has sold his claim will not be heard, over the objection of his grantee, to impeach the validity of the location made by him and subsequently sold. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

724. Under his authority as Chief Executive, the President may establish reservations embracing unappropriated mineral lands, and lands so reserved are not thereafter subject to location and purchase. Fort McGinnis Case, 1 L. D. 552 (Op. Atty. Gen.).

725. Mining claims valid and subsisting cannot be included in an Indian reservation set apart after the location of such claims. Chief Moses Indian Reservation, 9 C. L. O. 189.

726. A location of a mining claim upon land contained in an Indian reservation confers no rights upon the locator. If, after such location, the reservation is thrown open, such locator, to retain the benefit of work done previously, must relocate his claim. A regular location of the ground between the dates of the opening of the reservation and of relocation by the first occupant will defeat his right. Kendall v. San Juan S. M. Co., 144 U. S. 658. (Affirming 9 Colo. 349; 12 Pac. Rep. 198.) Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510 (S. C., 3 Mont. 65); United States v. Carpenter, 111 U. S. 347. *Contra*, Quigley v. Gillett, 101 Cal. 462; 35 Pac. Rep. 1040.

727. Plaintiff cannot recover any portion of ground in dispute by virtue of an attempted adverse prior location made prior to February 28, 1877 (date of opening of Sioux reservation), if defendants were on that day in exclusive possession with the requisite discovery of a vein of valuable minerals and had performed thereafter every act necessary to constitute and maintain a valid location. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

728. No valid location of a mining claim may be made of land while it is embraced in an Indian reservation; but if, at the date the reservation is thrown open, the locator has what would have been a valid location but for the reservation, he may cause proper record to be made, and date his location from that day. Uhlig v. Garrison, 2 Dak. 71; 2 N. W. Rep. 253; French v. Lancaster, 9 N. W. Rep. 716; 47 N. W. Rep. 395; Caledonia G. M. Co. v. Noonan, 3 Dak. 189; 14 N. W. Rep. 426; 121 U. S. 393; Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

729. The act of May 17, 1884 (23 Stat. 24), protects possessory claims to mines in Alaska theretofore initiated, though not based upon a compliance with all the provisions of the United States laws relative to the location of mining claims. Bennett v. Harkrader, 158 U. S. 441.

730. The bed of an unnavigable stream may be located under the placer laws. William Rablin, 2 L. D. 764.

731. A location of land covered by a valid subsisting location is void not only as to the prior locator, but as to all the world. Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581; Book v. Justice M. Co., 59 Fed. Rep. 106; Belk v. Meagher, 3 Mont. 65; 104 U. S. 279; 1 Mor. Min. Rep. 510.

732. An entry upon the premises in the actual possession of another, for the purpose of performing the acts necessary to constitute location and possession, amounts only to trespass, and cannot form the basis for the acquisition of title. Lebanon M. Co. v. Cons. Republican Mtn. M. Co., 6 Colo. 380; Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

733. A location of a mining claim on land within the limits of a Mexican grant *sub judice* confers no right, if the grant be after-

ward confirmed. Manning v. San Jacinto Tin Co., 7 Sawy. 418.

734. A valid location or relocation may be made only when land is open thereto. Taylor v. Middleton, 67 Cal. 656; 8 Pac. Rep. 594; 15 Mor. Min. Rep. 284; Hall v. Arnot, 80 Cal. 348; 22 Pac. Rep. 200–203; Sweet v. Webber, 7 Colo. 448; 4 Pac. Rep. 752; 4 West Coast Rep. 116.

735. The fact that ground not located is used for depositing tailings by one party will not reserve it from location by another. O'Keiffe v. Cunningham, 9 Cal. 589; 9 Mor. Min. Rep. 451.

736. A location of a mining claim in compliance with law confers a vested right which cannot be defeated by a subsequent reservation of the land by the Executive for public uses. Fort Maginnis Case, 1 L. D. 552 (Op. Atty. Gen.).

737. A location of land covered by a mineral entry is *void*, notwithstanding the alienage of the entryman; the entry, while it remains of record, being a segregation of the land, and such a location would not give the locator even the right of appeal from a decision dismissing his protest. Leary v. Manuel, 12 L. D. 345.

738. A location of a mining claim (where the entry therefor is canceled because of the non-mineral character of the land) may not be made the basis of a *settlement* claim to the same land. McIntyre v. Yokum, 16 L. D. 62.

739. Prior to August 4, 1892 (27 Stat. 348), a valid mining location could not be made of land chiefly valuable for deposits of building stone. Thorne v. Kinsey, 18 L. D. 416.

740. Prior to the act of August 4, 1892 (27 Stat. 348), a placer location could not be legally made for land containing only deposits of glass-sand and building stone, and the act of that date could not validate such a location previously made, in the face of an intervening homestead claim. Florence D. Delaney, 17 L. D. 120.

741. A placer location of land containing building stone was made in 1889. A preemption declaratory statement was filed by a settler the same year. In 1891 deposits of fire-clay were alleged to have been discovered. *Held*, that as the placer location was based upon a discovery of building stone without legal warrant, the subsequent discovery of fire-clay would not defeat the agricultural claim. [NOTE.—The real reason for the decision was probably failure to prove the existence of valuable deposits of fire-clay.] Clark v. Ervin, 17 L. D. 550.

742. An application for a lode patent was made by A. B., the owner of a conflicting lode claim, filed an adverse claim and commenced suit thereon, alleging a prior location of the ground in conflict. A. filed an answer, but thereafter amended the survey of his claim by so shortening it as to eliminate from it all conflict with the claim of B., and was allowed to make entry in the land office of the reduced area. He then withdrew his answer, and B., on testimony submitted, secured judgment for the land in controversy. *Held:* (1) That the withdrawal of the answer and abandonment of the application for patent as to the conflict did not remove the cause from the jurisdiction of the court. (2) That, in view of the first holding, the judgment is conclusive as between A. and B. of the priority of the location of B. Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683; 71 Fed. Rep. 848.

743. A complaint in a mere action of trespass need only allege in general terms ownership in mining property, allegations of location, etc., not being required. McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076.

744. As between two conflicting locations, both defective, the prior locator has the superior right of possession and may enforce it in an action of trespass. Neuebaumer v. Woodman, 89 Cal. 310; 26 Pac. Rep. 900.

745. A. and B. claim the same vein under conflicting locations. A verbal agreement was made that A. should obtain patent and convey a one-half interest to B., the expense to be borne equally. On suit to compel specific performance, such agreement was held to be within the Statute of Frauds; that relinquishing a disputed possession and simply refraining from filing an adverse claim constituted no part performance, and that even a part payment of the share of expenses of obtaining patent could not avail plaintiff, for the reason that there was no such mutuality of obligation in the agreement as would have enabled the defendant to compel such payment had the plaintiff seen fit to refuse it. Ducie v. Ford, 8 Mont. 233; 188 U. S. 587.

746. The boundaries of a claim as patented are conclusive as to the position of the lines of location as against the patentee. Waterloo M. Co. v. Doe, 56 Fed. Rep. 685.

747. A mineral entry should not be canceled because the entryman claimed by transfer from a local land officer by whom the claim was located, where the entryman and the officer acted in good faith. Rust and Criteser, 2 L. D. 754.

748. A corporation created under the laws of one of the United States, all of whose members are citizens of the United States, is competent to locate, or join with others in the location of, a mining claim. As to whether or not it can locate more land in one claim than an individual locator, *quære*. McKinley v. Wheeler, 130 U. S. 630.

749. A location made prior to the mining act of 1866 is valid if made according to the then existing local laws and customs. Glacier Mountain S. M. Co. v. Willis, 127 U. S. 471.

ANNUAL EXPENDITURE.

(See EXPENDITURE, p. 224.)

ABANDONMENT—FORFEITURE.

I. THE STATUTE.
II. DECISIONS.

I. THE STATUTE.

(See sec. 2324, U. S. Rev. Stat., p. 70.)

II. DECISIONS.

1. The terms "forfeiture" and "abandonment" are not synonyms. The first depends upon acts alone, the second largely upon intention; the first is a consequence which the law attaches to the failure of the party to do certain things, the second depends upon the act of the party. Packer v. Heaton, 9 Cal. 568; 4 Mor. Min. Rep. 447; St. John v. Kidd, 26 Cal. 263; 4 Mor. Min. Rep. 454.

2. There is a difference between forfeiture and abandonment, the first being the consequence attached by law to certain facts, the latter the act of the party. In the first, intention is immaterial; in the second it is everything. A claim may be abandoned before it is forfeited. Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188; 1 Mor. Min. Rep. 17.

3. Whether or not a mining claim has been abandoned is a question of intent. Waring v. Crow, 11 Cal. 366; 5 Mor. Min. Rep. 204; Bell v. Bed Rock T. & M. Co., 36 Cal. 214; 1 Mor. Min. Rep. 45; Morenhaut v. Wilson, 52 Cal. 263; 1 Mor. Min. Rep. 53; Stone v. Geyser Quicksilver M. Co., 52 Cal. 315; 1 Mor. Min. Rep. 59; Myers v. Spooner, 55 Cal. 257; 9 Mor. Min. Rep. 519; Taylor v. Middleton, 67 Cal. 656; 8 Pac. Rep. 294; 15 Mor. Min. Rep. 284; Derry v. Ross, 5 Colo. 295; 1 Mor. Min. Rep. 1; Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496; Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188; 1 Mor. Min. Rep. 17; Weill v. Lucerne M. Co., 11 Nev. 200; 3 Mor. Min. Rep. 372; Marshall v. Harney Peak Tin M., M. & M. Co., 1 S. Dak. 350; 47 N. W. Rep. 290.

4. The question of forfeiture under the mining laws is one of law to be decided by the court. Fairbanks v. Woodhouse, 6 Cal. 433 (1856); 12 Mor. Min. Rep. 86.

5. Abandonment is a mixed question of law and fact for the jury. Oreamuno v. Uncle Sam G. & S. M. Co., 1 Nev. 215; 1 Mor. Min. Rep. 32.

6. The question of abandonment is one of fact to be left to the jury. Taylor v. Middleton, 67 Cal. 656; 8 Pac. Rep. 594; 15 Mor. Min. Rep. 284.

7. Abandonment is a matter of intent and operates *instanter*. Derry v. Ross, 5 Colo. 295; 1 Mor. Min. Rep. 1; Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188; 1 Mor. Min. Rep. 17; Morenhaut v. Wilson, 52 Cal. 263; 1 Mor. Min. Rep. 53.

8. A location on which annual expenditure in labor or improvements is not made as required by law may be relocated if work has not been resumed. Russell v. Brosseau, 65 Cal. 605; 4 Pac. Rep. 643; Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341.

9. Where a mining claim held under possessory title has become subject to relocation by reason of the owner's failure to make the required annual expenditure thereon, a resumption of work by the owner before a relocation thereof will save the claim from forfeiture. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Lakin v. Sierra Buttes G. M. Co., 11 Sawy. 231; 25 Fed. Rep. 337; Belcher Cons. M. Co. v. Defferrari, 62 Cal. 160; Pharis v. Muldoon, 75 Cal. 284; 17 Pac. Rep. 70; McGinnis v. Egbert,

8 Colo. 41; 5 Pac. Rep. 658; 15 Mor. Min. Rep. 329; Gonu v. Russell, 3 Mont. 358; 12 Mor. Min. Rep. 630; Anderson v. Byam, 8 L. D. 388.

10. Work done upon the claim, even though upon a lode the apex of which is outside the claim, will prevent forfeiture. Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

11. Work may not be resumed by original locators after relocation for abandonment. Slavonian M. Co. v. Vacavich, 7 Sawy. 217; 7 Fed. Rep. 531.

12. "When, therefore, he avails himself of the statutory privilege of resuming work to preserve his estate from forfeiture, we hold that he should have prosecuted the same with reasonable diligence until the requirement for the annual labor and improvements had been obeyed." Honaker v. Martin, 11 Mont. 91; 27 Pac. Rep. 397. (Refusing to follow Belcher Cons. M. Co. v. Defferrari, 62 Cal. 160, and citing Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; Little Gunnell M. Co. v. Kimber, 1 Mor. Min. Rep. 536 (Colo.).

13. The resumption of work upon a mining claim before the relocation for the purpose of preventing a forfeiture as prescribed by section 2324, United States Revised Statutes, cannot be held to have been prosecuted with due diligence where it appeared that fifteen days prior to relocation all work thereon had ceased. Hirschler v. McKendricks, 16 Mont. 211; 40 Pac. Rep. 290.

14. Resumption of work on a mining claim to avoid forfeiture must be *bona fide* and not merely formal. Belcher Cons. G. M. Co. v. Defferrari, 62 Cal. 160.

15. Work done for the benefit of a claim, whether by one holding the legal or equitable title thereto, will operate to preserve the claim from forfeiture. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

16. If A. has failed to do his annual labor, and B. thereupon enters to relocate and proceeds so far as to put a notice on a stake at the discovery, but before he has marked the boundaries and otherwise completed the relocation A. re-enters and resumes labor in good faith, A. saves his location and renders null and void the prior acts of the relocator. Gonu v. Russell, 3 Mont. 358; 12 Mor. Min. Rep. 630.

17. By an amended location, a junior locator acquires a right to the conflict with a prior location then abandoned. Subsequent resumption of work by the first locator will not defeat this right. Johnson v. Young, 18 Colo. 625; 34 Pac. Rep. 173.

18. When A. and B. claim by location, and A. relocates to avoid relocation by strangers, and afterwards acquires B.'s title, the work done on the relocation may be taken as a resumption of work on the original location if A. elects to claim thereunder. Johnson v. Young, 18 Colo. 625; 34 Pac. Rep. 173.

19. Failure to comply with a mining district rule or regulation will not work a forfeiture of the claim unless the rule or regulation expressly so provides. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; McGarrity v. Byington, 12 Cal. 426; 2 Mor. Min. Rep. 311; Bell v. Bed Rock T. & M. Co., 36 Cal. 214; 1 Mor. Min. Rep. 45; Johnson v. McLaughlin, 1 Ariz. 493; 4 Pac. Rep. 130; Rush v. French, 1 Ariz. 99; 25 Pac. Rep. 816.

20. Forfeiture of a mining location or of an interest therein, for the non-performance of, or non-payment for, the annual assessment work thereon, is provided for under section 2324, United States Revised Statutes, and is effective only under the conditions therein stated. Com'r to M. C. Duggan, July 1, 1891.

21. The law presumes that locators forfeit their rights by failing to comply with the local rules and customs relative to annual work, although no penalty is specified therein. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

22. A forfeiture may take place by failing to comply with local rules and regulations of miners. St. John v. Kidd, 26 Cal. 263; 4 Mor. Min. Rep. 454.

23. The failure of a locator of a placer mining claim to perform the annual amount of work required by section 2324, United States Revised Statutes, renders the claim subject to relocation. Morgan v. Tillottson, 73 Cal. 520; 15 Pac. Rep. 88.

24. A failure to perform the amount of work required by local rules of miners is an abandonment. St. John v. Kidd, 26 Cal. 263; 4 Mor. Min. Rep. 454.

25. The failure to perform the work on a mining claim required by law amounts to an abandonment of the claim, and thereupon it may be occupied by another. Kramer v. Settle, 1 Idaho, 485; 9 Mor. Min. Rep. 561.

26. Mining district laws, when introduced in evidence, are to be construed by the court, and whether by virtue of such laws a forfeiture has accrued is a question of law, and cannot be submitted to the jury. Fairbanks v. Woodhouse, 6 Cal. 433 (1856); 12 Mor. Min. Rep. 86.

27. The question of abandonment is one of intent to be decided by the jury. Weill v. Lucerne M. Co., 11 Nev. 200; 3 Mor. Min. Rep. 372; Marshall v. Harney Peak T. M., M. & M. Co., 1 S. Dak. 350; 47 N. W. Rep. 290.

28. The question of abandonment is one of intention. The intention to abandon is not conclusively disproven by the statement of the owner, but the question is to be decided upon a consideration of all the facts in the case. Myers v. Spooner, 55 Cal. 257; 9 Mor. Min. Rep. 519.

29. The question of abandonment can never arise except where there has been possession, and then the question is simply whether the possessor intended to return and whether he intended to return in good faith or bad faith. Stone v. Geyser Quicksilver M. Co., 52 Cal. 315; 1 Mor. Min. Rep. 59.

30. An abandonment can only take place where the occupant leaves the land free to the appropriation of the next comer, without any intention to repossess or reclaim it for himself. Richardson v. McNulty, 24 Cal. 339; 1 Mor. Min. Rep. 11; St. John v. Kidd, 26 Cal. 263; 4 Mor. Min. Rep. 454.

31. "Where a miner gives up his claim and goes away from it, without any intention of repossessing it, and regardless of what may become of it, or who may appropriate it, an abandonment takes place and the property reverts to its original *status* as part of the unoccupied public domain and is open to location by the first comer." Derry v. Ross, 5 Colo. 295; 1 Mor. Min. Rep. 1; Richardson v. McNulty, 24 Cal. 339; 1 Mor. Min. Rep. 11.

32. Where the owner of a mining claim, which was erroneously included in a sale under a decree of court, moved his effects from the claim, and absented himself for two years, allowing the purchasers to work it without objection, while knowing that their title was invalid, and intending to claim it only in case their development rendered it profitable to do so, his acts will constitute an abandonment. Trevaskis v. Peard, 44 Pac. Rep. 246 (Cal.).

33. A conveyance of a mining claim by a qualified locator to an alien does not operate as an abandonment of the claim, but the alien may hold the claim as against all but the United States; and where the alienage of an applicant is set up by an adverse claimant, the declaration of intention to become a citizen, made by the applicant during the pendency of the adverse suit but before judgment, will render his title good as far as citizenship is concerned. Manuel v. Wulff, 152 U. S. 505. (Reversing 9 Mont. 279; 23 Pac. Rep. 723. Citing Man v. Huk, 3 L. D. 452; Ole Krogstad, 4 L. D. 564; Lord v. Perrin, 8 L. D. 536; Jackson v. Beach, 1 Johns. Cas. 399; Governeur v. Robertson, 11 Wheat. 333; Osterman v. Baldwin, 6 Wall. 116.)

34. A conveyance of a mining location by a qualified locator to an alien is not an abandonment of the location, but the alien may hold as against all but the State or the United States, and a conveyance by him to a citizen conveys good title. Gorman M. Co. v. Alexander, 2 S. D. 557; 51 N. W. Rep. 346. *Contra*, Lee v. Justice M. Co., 29 Pac. Rep. 1020.

35. The burden of clearly proving forfeiture of a mining claim is upon one who bases his claim thereon. Hammer v. Garfield M. & M. Co., 130 U. S. 291; Johnson v. Young, 18 Colo. 625; 34 Pac. Rep. 173; Oreamuno v. Uncle Sam G. & S. M. Co., 1 Nev. 215; 1 Mor. Min. Rep. 32; Coleman v. Curtis, 12 Mont. 301; 30 Pac. Rep. 266; Bishop v. Baisley, 41 Pac. Rep. 936; McNeil v. Pace, 3 L. D. 267.

36. Proof of a legal location of a mining claim and of possession thereof is proof of such a title as may be overthrown only by proof of forfeiture of the claim by failure to make the required annual expenditure thereon. Hammer v. Garfield M. & M. Co., 130 U. S. 291; Quigley v. Gillett, 101 Cal. 462; 35 Pac. Rep. 1040; Oreamuno v. Uncle Sam G. & S. M. Co., 1 Nev. 215; 1 Mor. Min. Rep. 32; McNeil v. Pace, 3 L. D. 267.

37. Although the burden of proving forfeiture is upon one relying on the same, he has made out a *prima facie* case by showing no work to have been done *on* the claim; and if the party denying the forfeiture relies on work done *outside* the claim, it devolves upon him to show such work to have been done for the benefit of the claim. Hall v. Kearney, 18 Colo. 505.

38. One claiming by relocation must first introduce evidence going to show abandon-

ment before he will be allowed to prove relocation. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

39. Forfeiture must be pleaded to render evidence thereof admissible. Hammer v. Garfield M. & M. Co., 130 U. S. 291; Morenhaut v. Wilson, 52 Cal. 263; 1 Mor. Min. Rep. 53; Quigley v. Gillett, 101 Cal. 462; 35 Pac. Rep. 1040; Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345; Wulff v. Manuel, 9 Mont. 279; 23 Pac. Rep. 723; Mattingly v. Lewisohn, 35 Pac. Rep. 111; Bishop v. Baisley, 41 Pac. Rep. 936.

40. The defendant in an ejectment suit involving a mining claim may prove plaintiff's title to have been lost by abandonment of the claim under a general denial of plaintiff's title. Bell v. Brown, 22 Cal. 671; 5 Mor. Min. Rep. 240.

41. Abandonment need not be specially pleaded in order to allow proof thereof. Bell v. Bed Rock T. & M. Co., 36 Cal. 214; 1 Mor. Min. Rep. 45.

42. Where defendant in an adverse suit relies upon a relocation of plaintiff's location after forfeiture thereof, he is not obliged to plead such forfeiture specially. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

43. Proof of the abandonment of a mining claim by a defendant may be given by plaintiff in ejectment therefor, without a special plea, where the defendant pleads, and relies on as a defense to the action, a location prior to that of plaintiff. Trevaskis v. Peard, 44 Pac. Rep. 246 (Cal.).

44. Under the act of May 10, 1872, representation by annual performance of labor is constituted one of the muniments of title. No forfeiture can take place until after full completion of the year during which by law work may be done. Belk v. Meagher, 3 Mont. 65; 104 U. S. 279; 1 Mor. Min. Rep. 510.

45. An abandoned claim is open to relocation January 1st of the year succeeding the abandonment. Pharis v. Muldoon, 75 Cal. 284; 17 Pac. Rep. 70.

46. A mining claim is not subject to relocation for abandonment until after the expiration of the calendar year. Mills v. Fletcher, 100 Cal. 143; 34 Pac. Rep. 637.

47. A relocation of a mining claim for abandonment before the expiration of the time allowed by law for the performance of the work is void. Hall v. Hale, 8 Colo. 351; 8 Pac. Rep. 580.

48. A relocation made at 1 A. M., January 1st, questioned but not passed upon. Pharis v. Muldoon, 75 Cal. 284; 17 Pac. Rep. 70.

49. To give a person the right to procure by forfeiture proceedings under section 2324, United States Revised Statutes, the interest of another in a mining claim held by possessory title, the two persons must not only be co-owners at date of the forfeiture notice but during the year in which the work was done upon the claim. Turner v. Sawyer, 150 U. S. 578.

50. Notice of forfeiture, under section 2324, United States Revised Statutes, addressed to a co-owner then deceased, is of no effect. Billings v. Aspen Cons. M. Co., 51 Fed. Rep. 338.

51. The defendant in an adverse suit cannot defeat plaintiff's title by showing that a forfeiture notice given by plaintiff to co-owners was insufficient. That point may be raised only by the co-owners. Becker v. Pugh, 17 Colo. 243; 29 Pac. Rep. 178. (First trial, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304.)

52. A co-owner who has been "advertised out" may show his compliance with the law in the matter of expenditures, and that there was in fact no forfeiture. Brundy v. Mayfield, 15 Mont. 201; 38 Pac. Rep. 1067.

53. Failure to perform annual labor on the senior of two conflicting locations during the calendar year does not operate to vest title to the land in conflict in the owner of the junior location, who can secure same only by a relocation made before resumption of work by the senior locator. Oscamp v. Crystal River M. Co., 19 U. S. App. 18; 58 Fed. Rep. 293.

54. Where a junior location overlaps a senior location it is not validated as to the conflicting ground by the abandonment of the senior location. In order to secure a right to such ground the junior locator must relocate it. Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

55. If the senior of two conflicting locations be abandoned, and during such abandonment the junior locator files an amended location notice embracing such conflict, the right to the conflict vests in the junior

locator. Johnson v. Young, 18 Colo. 625; 34 Pac. Rep. 178.

56. Where, after publication of notice of application for patent and before entry, a mining claim is relocated by a stranger for failure on part of the applicant to make the required annual expenditure, and such failure and relocation are shown at a hearing, the entry will be canceled and the parties left to litigate their conflicting claims in court. The Land Department will not pass upon the validity of the relocation in such a case. Little Pauline Lode v. Leadville Lode, 7 L. D. 506.

57. After application for patent and publication of notice thereof, and before entry, a claim may be relocated for abandonment, and in case of such relocation the application will be canceled if no adverse claim, or suit based on an adverse claim, is pending against said application. Continental G. & S. M. Co. v. Gage, 10 L. D. 534.

58. Mineral application, followed by notice, segregates the land applied for, and abandonment thereof must be shown and the application canceled before a second application is received for the land. Andrew J. Gibson (on review), 21 L. D. 219.

59. Where a claim has been applied for and subsequently forfeited, a relocator who desires to apply for a patent should secure the cancellation of the existing application by the Land Department. Steel v. Gold Lead M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

60. One desiring to apply for a mineral patent for land covered by an existing mineral application may secure its cancellation by proving abandonment of the claim applied for at a hearing to which the applicant is a party. Moylan C. Fox, 2 L. D. 766.

61. Where a claim has been abandoned after publication of notice of application for patent therefor and then relocated by a stranger, and subsequently the applicant makes entry and secures a patent, he will be declared to hold title under such patent as trustee for the relocator. (Strong dissenting opinion.) South End M. Co. v. Tinney, 35 Pac. Rep. 89.

62. "A location since the 10th day of May, 1872, based on a discovery made within the limits of a claim properly located, and not abandoned or lost by failure to perform the labor thereon required by law, is an invalid location; for by the provisions of section 2322, the locator of such claim has the exclusive right of possession and enjoyment of all the surface included within the lines of the location, 'and of all the veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines.' If the locator then has the exclusive right of the possession and enjoyment, how can a prospector go on such claim and make a valid discovery?" Branagan v. Dulaney, 2 L. D. 744.

63. A portion of a mining claim may be abandoned (on principle of estoppel) by assenting to and encouraging another to locate the same and to spend money in work thereon. Golden Terra M. Co. v. Mahler (Smith), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

64. A valid location cannot be based upon a discovery made within the limits of a prior subsisting location. It must be made upon the unoccupied and unappropriated domain, and the mere fact that the prior locator does not object is immaterial, unless he abandons the ground in conflict. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

65. The validity of a location, based upon a discovery made within a prior location with the consent of the prior locator, may not be questioned on that account by a grantee of such prior locator, as the assent of his grantor to the making of the second discovery and location operated as an abandonment of conflicting rights. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

66. The valid location of a mining claim is a grant from the government to the person making the location. The location is the inception of the grant, and the patent is its consummation. The grant is kept alive by representation (work). A failure to represent forfeits the grant and makes void the title acquired by location, and the ground thereupon becomes again subject to location and purchase. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

67. A valid location is the inception of a grant from the United States, the patent being the consummation, and the property located may not be sold by the United States

unless forfeited. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345; Garfield M. &. M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; S. C., 130 U. S. 291.

68. A claim may be relocated if either forfeited or abandoned. Golden Fleece G. & S. M. Co. v. Cable Cons. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; Russell v. Brosseau, 65 Cal. 605; 4 Pac. Rep. 643.

69. Annual expenditure must be made on a mining claim up to the date of entry to prevent the relocation thereof for forfeiture, and the fact that large expenditures have been made will not prevent such relocation, even though the applicant thought he had made entry. Ferguson v. Belvoir M. & M. Co., 14 L. D. 43.

70. Failure to perform annual labor renders a claim subject to relocation. Morgan v. Tillottson, 73 Cal. 520; 15 Pac. Rep. 88.

71. After legal abandonment of a claim by failure to perform annual labor, it is the entry by a relocator, not mere lapse of time, that destroys the right of the original owner. Little Gunnell M. Co. v. Kimber, 1 Mor. Min. Rep. 536 (Colo.).

72. A mine can only be relocated after forfeiture. Smith v. Van Clief, 6 C. L. O. 2.

73. The laws and customs which point out the manner of locating mining claims are conditions precedent to the right to possess and mine a claim, and no such right can be acquired until such conditions precedent have been complied with. The requirements as to performance of annual labor, however, are conditions subsequent, the mere breach of which is not, *per se*, sufficient to cause a forfeiture, which must result from entry by the grantor (United States), or one claiming under it; *i. e.*, a relocation of the claim under the mineral land laws. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

74. One may not prevent the owner of a claim from performing the required annual labor and then take advantage of his own wrong by alleging abandonment by the owner because of failure to do the work. Craig v. Thompson, 10 Colo. 517; 16 Pac. Rep. 24; Mills v. Fletcher, 100 Cal. 143; 34 Pac. Rep. 687.

75. The owner of a placer mining claim does not forfeit his right thereto, so as to render it subject to relocation, by a failure to perform the annual assessment work during a time when adverse possession is held by another, where he commences action for its recovery within the statutory time. Trevaskis v. Peard, 44 Pac. Rep. 246 (Cal.).

76. A. and B. own a claim in common. A. promises to do assessment work, but fails to do so and relocates for himself. *Held*, that the claim was abandoned, and therefore subject to the relocation, but that A. might be decreed trustee for B. under the relocation. Saunders v. Mackey, 5 Mont. 523; 6 Pac. Rep. 361.

77. If, through conspiracy between one tenant in common of a mining claim and a stranger, the claim is abandoned and is relocated by the stranger, all rights under the original location are lost. Injured owners must proceed in equity to have the relocator declared trustee for their use. Doherty v. Morris, 11 Colo. 12; 16 Pac. Rep. 911.

78. Assessment work was not done on a claim though one owner promised to see that it was done. A third person, in collusion with the owner by whose fault abandonment occurred, relocated and applied for patent. The other owner in the original location adversed. *Held*, that he had no grounds for adversing, but should file a bill in equity against the applicant to have him declared a trustee. Doherty v. Morris, 11 Colo. 12; 16 Pac. Rep. 911.

79. Where a relocation of a forfeited claim is made by one of the owners with the understanding that it is made for the benefit of all, he will be declared trustee for his co-owners. Hunt v. Patchin, 12 Sawy. 304; 35 Fed. Rep. 816.

80. A locator of a mining claim who has allowed his location to lapse for failure to do the annual assessment work and to become subject to relocation under section 2324, United States Revised Statutes, providing for the relocation of claims on which the required annual amount of work has been done, has the right to make a new location covering the same ground. Warnock v. De Witt, 11 Utah, 324; 40 Pac. Rep. 205.

81. One of several owners of a mining claim may relocate the same for himself after abandonment and forfeiture thereof. Strang v. Ryan, 46 Cal. 33; 1 Mor. Min. Rep. 48.

82. Where several persons post a notice of location of a mining claim and sign the same as locators, a subsequent notice posted on the same claim, signed by some of the original locators and by other persons whose names did not appear in the first notice, is an original notice so far as the new locators are concerned, but does not affect the rights of the prior locators whose names are omitted, nor operate as an abandonment of the first location by the persons whose names are signed to both notices; and in an action by all the persons whose names are signed to the notices to quiet their title as against an adverse claimant, the second notice is admissible in evidence. Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182.

83. Where one of two discoverers acquired the right of the other and erased the name of the other from the location notice and remained in sole possession, the alteration of the notice did not amount to an abandonment of the original location. Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

84. If a location made by several persons is abandoned, a relocation may be made by some of the original locators associated with strangers. Strang v. Ryan, 46 Cal. 33; 1 Mor. Min. Rep. 48.

85. The owners of a mining claim holding by possessory right may not, after mortgaging the same, *abandon* the claim and allow it to be relocated and thereby defeat the mortgage. (In this case, however, though there was an attempted *abandonment*, there was no *forfeiture*, as annual labor was performed by the mortgagors during the year of relocation.) Alexander v. Sherman, 16 Pac. Rep. 45; 15 Mor. Min. Rep. 638. See Saunders v. Mackey, 5 Mont. 523; 6 Pac. Rep. 361.

86. Where, in payment for a mining claim held by possessory title, notes are given, the maker cannot object, when they fall due, that subsequent to the purchase the claim was abandoned. The grantor sold only a possessory title, and the duty of maintaining the claim fell upon the grantee. Corbett v. Berryhill, 29 Iowa, 157; 14 Mor. Min. Rep. 671.

87. One who sells to another a locator's possessory right to a mining claim may not afterward relocate the land because of the invalidity of the first location, though he will not be estopped from relocating the ground if the claim is abandoned by the grantee. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183; Blake v. Thorne, 16 Pac. Rep. 270.

88. The grantor of a mining claim, who has relocated it as abandoned property after his conveyance, may not enforce payment of the purchase price. Drake v. Gilpin County M. Co., 16 Colo. 231.

89. A tunnel claimant has no cause for adversing the application of a lode claimant who has made a discovery outside of the line of the tunnel, and whose location lies across the line of the tunnel, unless the lode has been discovered in the tunnel. Hope M. Co. v. Brown, 7 Mont. 550; 19 Pac. Rep. 216. (Overruled, S. C., 11 Mont. 370; 28 Pac. Rep. 782, wherein it is held that patent proceedings by the lode claimant will be suspended until development of the lode in the tunnel or abandonment of the tunnel right; and *semble*, the lode claimant may be restrained from taking ore from the line of the tunnel. Refusing to follow Corning Tunnel & M. Co. v. Pell, 4 Colo. 507; 14 Mor. Min. Rep. 612.)

90. Discoverers of veins from the surface on the line of a prior tunnel duly located will be restrained until it appears that the veins will not be discovered in the tunnel, or until such tunnel rights have been abandoned. Hope M. Co. v. Brown, 11 Mont. 370; 28 Pac. Rep. 782. (Overruling S. C., 7 Mont. 550; 19 Pac. Rep. 218.)

91. Patent will not issue for a claim on a projected line of a tunnel held under section 2323, United States Revised Statutes, but patent proceedings for such claim will be suspended to await further development in the tunnel, or abandonment of the tunnel claim. Back v. Sierra Nevada Con. M. Co., 2 Idaho, 386; 17 Pac. Rep. 83.

92. "We can imagine several ways in which it can be shown that the adverse claim is waived without invading the jurisdiction of the court while the case is still pending. One of these would be the production of an instrument signed by the contestant, and duly authenticated, that he had sold his interest to the other party, or had abandoned his claim and his contest. Or, since the act says that all proceedings shall be stayed in the land office from the *filing of the adverse claim*, and not from the commencement of the action in the court, within thirty days,

such delay of thirty days is made, by the statute, conclusive of a waiver. A filing in the records of the court, by the plaintiff, of a plea that he abandons his cause or waives his claim, might authorize the land office to proceed." Richmond M. Co. v. Rose, 114 U. S. 576.

93. An application for a lode patent was made by A. B., the owner of a conflicting lode claim, filed an adverse claim and commenced suit thereon, alleging prior location of the ground in conflict. A. filed an answer, but thereafter amended the survey of his claim by so shortening it as to eliminate from it all conflict with the claim of B., and was allowed to make entry in the Land Office of the reduced area. He then withdrew his answer and B., on testimony submitted, secured judgment for the land in controversy. *Held:* (1) That the withdrawal of the answer, and abandonment of the application for patent as to the conflict did not remove the cause from the jurisdiction of the court. (2) That, in view of the first holding, the judgment is conclusive as between A. and B. of the priority of the location of B. Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683.

94. A relocation may be made by the owner of an abandoned claim just as by a stranger. Warnock v. Dewitt, 11 Utah, 324; 40 Pac. Rep. 205; Hunt v. Patchin, 35 Fed. Rep. 816; Com'r to Max Boehmer, March 15, 1881; Copp's Min. Lands (2d ed.), 300.

95. A second location made by original locators and others does not necessarily operate as an abandonment of the first location. Weill v. Lucerne M. Co., 11 Nev. 200; 3 Mor. Min. Rep. 372.

96. A successful adverse claimant may lose his rights by forfeiture or abandonment of his claim. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

97. "I apprehend, however, that the successful litigant, under said section (2326), occupies the same position as does an applicant who has given due notice of application, during which no adverse claim has been filed. In each case the rights of the claimant may be lost by abandonment any time prior to entry." Kennedy v. Johnson, Com'r to Leadville Office, Feb. 24, 1896.

98. Where, in the location certificate of a mining claim of which entry has been made, it is stated that the location is upon an abandoned claim, the entryman is not required to furnish evidence of such abandonment, as the owner of the claim alleged to be abandoned loses his rights by failure to file an adverse claim. Manhattan & San Juan S. M. Co., 2 L. D. 698.

99. A relocator cannot avail himself of mineral in the public lands which another has discovered, until the discoverer has, in law, abandoned his claim, and left the property open for another to take up. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510 (S. C. in 3 Mont. 65).

100. Mere possession of abandoned mining improvements is not a mining claim. Richards v. Dower, 81 Cal. 44; 22 Pac. Rep. 304. See 151 U. S. 658.

101. A relocator of an abandoned claim may base the relocation on the discovery of mineral already made by the original locator, and may adopt the original markings of the claim (but in Colorado must perform ten feet of development work). Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

102. The relocator of an abandoned claim, under Colorado statutes, must either sink the discovery shaft ten feet deeper or make a new opening of the required depth or length. Little Gunnell M. Co. v. Kimber, 1 Mor. Min. Rep. 586.

103. Upon the issue of forfeiture of a mining claim, the conduct and interest of those who claim by relocation after such alleged forfeiture may be considered in weighing the testimony. Doherty v. Morris, 17 Colo. 105; 28 Pac. Rep. 85.

104. A mining claim was worked until 1869, and was then abandoned. A town site patent issued in 1869 covering the claim. The claim was located subsequently in 1884. *Held*, that the claim was not such a mine as would be excepted from the town site patent. Richards v. Dower, 81 Cal. 44; 22 Pac. Rep. 304; 151 U. S. 659.

105. The fact that land was once embraced in a mining location, since abandoned, is not proof of its mineral character, which must appear as a present fact. Berry v. C. P. R. R. Co., 15 L. D. 463.

106. Where land has been adjudged mineral, an agricultural claimant who shows that

mining operations thereon have been abandoned as unprofitable, in the absence of any other showing of the mineral character is entitled to a decision holding it to be non-mineral. Thomas v. Thomasson, 16 L. D. 52.

107. Where the land covered by a mining claim is adjudged mineral, a new hearing to determine the character of the land will not be ordered unless such claim be alleged to have been abandoned. McCharles v. Roberts, 20 L. D. 564.

108. A relocation of a mining claim is an implied admission of the validity of the original location, and an assertion that the relocator claims a forfeiture by reason of a failure on the part of the original locator to make his annual expenditures. Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795.

109. In order to have a forfeiture take place there must be some person natural or artificial who is entitled to the benefit of the forfeiture when it occurs. Wiseman v. McNulty, 25 Cal. 230.

110. A party who contributes the required expenditures can retain his interest in the mine; but if a party fails to contribute the actual expenditures, the remedy is not in the General Land Office. B. H. Brooks, 5 C. L. O. 4.

111. The failure of an adverse claimant to give the register and receiver notice of the commencement of suit in court cannot work a forfeiture of his right. Halsey v. Hewitt, 5 C. L. O. 162.

112. The sale of that portion of the claim containing the discovery is not *per se* an abandonment of the remainder of the claim. Little Pittsburgh Cons. M. Co. v. Annie M. Co., 5 McCrary, 298.

113. Continuous possession and performance of annual assessment work are sufficient to disprove a charge of abandonment. Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 188.

114. The regularity and legality of forfeiture proceedings against alleged delinquent co-owners, under section 2324, United States Revised Statutes, will not be questioned by the Land Department if such co-owners fail to protect their rights by filing an adverse claim under section 2326, United States Revised Statutes. Grampian Lode, 1 L. D. 544.

115. Authority to enact laws for the forfeiture of mineral public lands is a prerogative of sovereignty and cannot be exercised by a Territory. A Territory cannot declare or enforce a forfeiture of a mining claim located or held by an alien. Territory v. Lee, 2 Mont. 124; 6 Mor. Min. Rep. 248.

116. A relocation made by stealth and maintained by force contrary to the Colorado statute, is invalid, notwithstanding the failure of the original owner to perform the required annual labor on the claim. McNeil v. Pace, 3 L. D. 267.

FORFEITURE TO CO-OWNER.

I. THE STATUTE.
II. REGULATIONS.
III. DECISIONS.

I. THE STATUTE.

(See sec. 2324, U. S. Rev. Stat., p. 70.)

II. REGULATIONS.

6. Upon the failure of any one of several co-owners of a vein, lode, or ledge, which has not been entered, to contribute his proportion of the expenditures necessary to hold the claim or claims so held in ownership in common, the co-owners, who have performed the labor or made the improvements as required by said Revised Statutes, may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent co-owner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his co-owners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving dates and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent co-owner failed to contribute his proper proportion within the period fixed by the statute.

III. DECISIONS.

(See CO-OWNER, p. 396.)

LEGAL TITLE.

SURVEY.

I. THE STATUTE.
II. REGULATIONS.
III. DECISIONS.
1. *General.*
2. *United States Deputy Mineral Surveyors.*
3. *Manual of Surveying.*
4. *End Lines.*

I. THE STATUTE.

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land-office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States Surveyor-General, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land-office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land-office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States Surveyor-General that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. 17 Stat. 92; 19 Stat. 52; 21 Stat. 61; sec. 2325, U. S. Rev. Stat.

II. REGULATIONS.

28. The claimant is required in the first place to have a correct survey of his claim made under authority of the surveyor-general of the State or Territory in which the claim lies; such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field notes, in each case, will be prepared by the surveyor-general; one plat and the original field notes to be retained in the office of the surveyor-general, one copy of the plat to be given the claimant for posting upon the claim, one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor-general to the register of the proper land district to be retained on his files for future reference. As there is no resident surveyor-general for the State of Arkansas, applications for the survey of mineral claims in said State should be made to the Commissioner of this office, who, under the law, is *ex officio* the U. S. surveyor-general.

45. The surveyors-general should designate all surveyed mineral claims by a progressive series of numbers, beginning with survey No. 37, irrespective as to whether they are situated on surveyed or unsurveyed lands, the claim to be so designated at date of issuing the order therefor, in addition to the local designation of the claim; it being required in all cases that the plat and field-notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the locus of the claim, with reference to the lines of public surveys, by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument. Such connecting line must not be more than *two miles* in length and should be measured on the ground direct between the points, or calculated from actually surveyed traverse lines if the nature of the country should not permit direct measurement. If a regularly established survey corner is within two miles of a claim situated

on unsurveyed lands, the connection should be made with such corner in preference to a connection with a United States mineral monument. The connecting line must be surveyed by the deputy mineral surveyor at the time of his making the particular survey, and be made a part thereof.

46. Upon the approval of the survey of a mining claim made upon surveyed lands, the surveyor-general will prepare and transmit to the local land office and to this office a diagram tracing showing the portions of legal 40-acre subdivisions made fractional by reason of the mineral survey, designating each of such portions by the proper lot number, beginning with No. 1 in each section and giving the area of each lot.

47. The survey and plat of mineral claims, required by section 2325, Revised Statutes of the United States, to be filed in the proper land office, with application for patent, must be made subsequent to the recording of the location of the mine; and when the original location is made by survey of a United States deputy surveyor such location survey can not be substituted for that required by the statute, as above indicated.

48. The surveyor-general should derive his information upon which to base his certificate as to the value of labor expended or improvements made from his deputy who makes the actual survey and examination upon the premises, and such deputy should specify with particularity and full detail the character and extent of such improvements.

49. The following particulars should be observed in the survey of every mining claim:

(1) The exterior boundaries of the claim should be represented on the plat of survey and in the field notes.

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field-notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

	Acres.
Total area of claim	10.50
Area in conflict with survey No. 302	1 56
Area in conflict with survey No. 918	2.33
Area in conflict with Mountain Maid lode mining claim, unsurveyed	1.48

It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field-notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. It is better that the application for patent should state the portions to be excluded in express terms. A survey executed as in the example given will enable the applicant for patent to exclude such conflicts as may seem desirable. For instance, the conflict with survey No. 302 and with the Mountain Maid lode claim might be excluded and that with survey No. 948 included.

(As amended Nov. 7, 1895.)

50. The rights granted to locators under section 2322, Revised Statutes, are restricted to such locations on veins, lodes, or ledges as may be "situated on the *public domain*." In applications for lode claims where the survey conflicts with a prior valid lode claim and the ground in conflict is excluded, the applicant not only has no right to the excluded ground, but he has no right to that portion of any vein or lode the top or apex of which lies within such excluded ground, unless his location was prior to May 10, 1872. His right to the lode claimed terminates where the lode, in its onward course or strike, intersects the exterior boundary of such excluded ground and passes within it. The end line of his survey should not, therefore, be established beyond such intersection.

51. Where, however, the lode claim for which survey is being made was located prior to the conflicting claim, and such conflict is to be excluded, in order to include all ground not so excluded the end line of the survey may be established within the conflicting lode claim, but the line must be so run as not to extend any farther into such conflicting claim than may be necessary to make such end line parallel to the other end line and at the same time embrace the ground so held and claimed. The useless practice in such cases of extending *both* the side lines of a survey into the conflicting claim, and establishing an end line wholly within it, beyond a point necessary under the rule just stated, will be discontinued.

III. Decisions.

1. *General.*

1. "The Commissioner of the General Land Office shall perform, under the direction of the Secretary of Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all agents [*grants*] of land under the authority of the government." Sec. 453, U. S. Rev. Stat. See Knight v. U. S. Land Ass'n, 142 U. S. 161.

2. The Land Department has exclusive jurisdiction in the matter of the survey of public lands, and its decisions are unassailable in the courts except in a direct proceeding. Haydel v. Dufresne, 17 How. 23; Cragin v. Powell, 128 U. S. 691; Knight v. U. S. Land Ass'n, 142 U. S. 161.

3. A survey made by the proper officer of the United States and approved by the Land Department, is not subject to collateral attack. Russell v. Maxwell Land Grant Co., 158 U. S. 253.

4. The official survey of a Mexican grant after confirmation by Congress is conclusive when collaterally attacked. Colorado Fuel Co. v. Maxwell Land Grant Co., 43 Pac. Rep. 916 (Colo.).

5. The matter of making and correcting surveys of public land is under the charge of the General Land Office, but it may not so use its power as to deprive claimants of their rights. Cragin v. Powell, 128 U. S. 691.

6. Money deposited to cover cost of work in the United States Surveyor General's office on a mineral survey may not be repaid though unexpended, but may be applied on another survey if desired. Elijah M. Dunphy, 8 L. D. 102.

7. Certificates of deposit of money to pay office expenses of a Surveyor General in the matter of a mineral survey are not assignable, but if the survey for which the deposit is made is not executed, the depositor may apply the deposit on another survey. Com'r to G. W. Park, July 13, 1896.

8. The applicant for a mineral survey should be required to deposit only the sum necessary to defray expenses of work in the office of the United States Surveyor General, not for the work of the Deputy Surveyor, by whom the survey is to be made. G. B. Foote, 2 L. D. 773.

9. A deposit of $320 for the office work in connection with an application covering ten mineral locations and two mill sites is not an unreasonable sum. Montana M. & Red. Co., 16 C. L. O. 269.

10. Where an amendment of a mineral survey is of such character as will not require an entirely new plat and field notes, the charge for office work should not be as much as in case of an original survey. Com'r to Surveyor General of California, Jan. 2, 1892.

11. In making surveys, references should be made to known mines within or near the boundaries of the claims. Thor Mine, 5 C. L. O. 51.

12. The fact that a mining survey conflicts with a prior survey does not prevent the applicant from including the conflicting area in his application for patent. James H. Nolan, 9 C. L. O. 230.

13. The survey of a mining claim must show the area of the conflict with every intersecting survey. Circular of Nov. 16, 1882, 1 L. D. 693.

14. In conflicting surveys of mining claims the subsequent plat of survey should show the conflict with prior surveys. Thor Mine, 5 C. L. O. 51.

15. A mineral survey should show conflicts with prior surveys. A certified copy of location notice should accompany the field notes. The Surveyor General should be satisfied that five hundred dollars' worth of improvements have been made. Com'r to Surveyor General of Montana, March 27,1880.

16. The plat of a lode mining claim must show all conflicts, and unless such conflicts are shown the plat should not be approved. Grand Dipper Lode, 10 C. L. O. 240.

17. Where surveys conflict, the plats and field notes should show the extent of such conflicts, etc. J. H. Russell Lode, 5 C. L. O. 18.

18. The fact that the survey of a mining claim fails to show conflict with another claim, the survey of which was actually later, but which was first approved, is not a ground for rejection of an application for patent for the claim. Big Flat Gravel M. Co. v. Big Flat Gold M. Co., 1 L. D. 562.

19. Applicants for mining patent are not bound to note conflicts with unofficial surveys on plat and field notes. Wisconsin M. Co. v. Cooper, 10 C. L. O. 69.

20. Where by error of the United States Deputy Mineral Surveyor the line connecting the survey of a mining claim with a corner of the public surveys or United States mineral monument is incorrectly given, an amended survey should be ordered and the entry referred to the Board of Equitable Adjudication. Walter C. Childs, 10 L. D. 178.

21. A mineral entry may be referred for confirmation to the Board of Equitable Adjudication where the *locus* of the claim was not shown in the published notice by a line connecting the claim with the public surveys. Silver King Quartz Mine, 11 L. D. 234.

22. The published notice of application for a mineral patent is sufficiently definite as to showing the *locus* of the claim if it connects the same with the corner of a patented town

site, which is also the corner of a patented placer, both of which are connected in their respective surveys to a United States mineral monument. (By instructions dated March 15, 1892, 14 L. D. 294, the Secretary holds that this decision will not be regarded as a precedent.) Eugene McCarthy, 14 L. D. 105.

23. The survey of a mining claim may be connected with a corner of a section of an unsubdivided township, if such corner is an exterior one, *i. e.*, upon a township line, as in running the exterior line of a township the surveyor is required to set mile posts, thus fixing exterior section corners. John C. Hauck, 10 L. D. 391.

24. While paragraph 45 of the Mining Regulations directs that no line connecting the survey of the claim with a corner of the public surveys or United States mineral monument shall exceed two miles in length, a new connection will not be required if such line exceeds that length where the survey is connected with the official surveys of other mining claims. (In this case the connecting line was 13,414.7 feet in length.) Departmental decision of June 13, 1896, *In re* S. H. Standart.

25. If a mining claim is situated within the land of which a township survey has been approved, but no corner of the public survey can be found within two miles of the claim after diligent search, the claimant is not required to secure the restoration of the obliterated corners, but connection may be made with a United States mineral monument. Com'r to Surveyor General of Nevada, May 26, 1892, *In re* Sentinel Lode.

26. A connection of a mineral survey with a patented mining claim is not a connection with a public survey. Com'r to J. A. Robinson, April 23, 1891, *In re* Lake Mine.

27. Where a mining claim is not within two miles of a public survey corner or a United States mineral monument, such a monument should be established in the vicinity by the Deputy Surveyor at the expense of the claimant. Com'r to Surveryor General of South Dakota, March 10, 1893.

28. The line connecting a mineral survey with a public corner or a United States mineral monument must be actually run in the survey of the claim, not calculated through the connection of other surveys. Com'r to Surveyor General of Montana, Oct. 27, 1891, *In re* Ivanhoe Lode; To Surveyor General of Utah, April 10, 1891, *In re* Kennedy Lode, and *In re* Hunter Lode.

29. The official survey of a mining claim must be in accordance with the recorded notice of location made the basis of the Surveyor General's order authorizing the survey of the claim. Philip Dephanger, 1 L. D. 581; Rose Nos. 1 & 2 Lodes, 22 L. D. 83.

30. The survey of a mining claim must be made in accordance with the location made the basis of the order for the survey. If the location is amended after the issuance of such order, and the survey is made in accordance therewith, a resurvey will be required. Lincoln Placer, 7 L. D. 81; Sulphur Mine, 5 C. L. O. 100.

31. The survey must be based upon a location of which notice was recorded prior to issuance of the order for the survey. Com'r to Surveyor General of Idaho, Nov. 24, 1891.

32. An entry allowed upon a survey that did not follow the amended location should not be canceled, but a new survey should be made in conformity with said location. Lincoln Placer, 7 L. D. 81.

33. The location notice, application for patent and survey should agree in describing the same premises. Wandering Boy Lode, 2 C. L. O. 2.

34. The return of the Deputy must show the survey of a claim to be within the location upon which the order for the survey was based. Philip Dephanger, 1 L. D. 581; Lincoln Placer, 7 L. D. 81.

35. Where the record shows the survey of a mining claim to have been based upon an amended location made by a stranger in his own name, the applicant for patent may show by affidavits that such stranger, in making the amended location, acted as the agent of the applicant. Gray Copper Lode, 18 L. D. 536.

36. As to the manner of establishing mineral (or locating) monuments, see Survey Manual, p. 152; Frank P. Cavanah, 8 C. L. O. 5; Com'r to Surveyor General of Idaho, March 27, 1880.

37. All surveys of mining claims must be connected either with a corner of the public surveys (if there be one within two miles) or a United States mineral monument. George S. Dodge, 6 C. L. O. 122; Departmental decision, June 18, 1896, in case of Sulphur Springs Quicksilver Mine; Senator Mill Site, 7 L. D. 475.

38. Republication of notice of application for patent will be required where the published notice failed to fix the *locus* of the claim by a line connecting the same with a corner of the public survey or a United States mineral monument. Tennessee Lode, 7 L. D. 393.

39. Notice of application for a mineral patent must give the course and length of the line connecting the claim with a corner of the public surveys or with a mineral monument. It is not sufficient to connect the claim with the corner of the survey of an unpatented mining claim. Emperor Wilhelm Lode, 5 L. D. 685.

40. Where the notices of application for patent were sufficiently definite in the matter of description of the claim to cause an adverse claim to be filed, republication of notice will not be required because of an error of ten degrees in the course and three chains in the length of the line connecting the survey of the claim with a corner of the public surveys, but the entry may be referred to the Board of Equitable Adjudication. Walter C. Childs, 10 L. D. 178.

41. Republication will be required if the *locus* of the claim applied for is not shown in the published notice by the connection given in the official survey. (The published notice gave the bearing from corner No. 2 of the claim to a United States mineral monument as N. 62° E., 532 feet, while the true course was N. 6° E.) Hoffman v. Venard, 14 L. D. 45.

42. The published notice of application for a mineral patent must follow the survey in giving a connection between the claim and a United States mineral monument or corner of the public survey, and republication will be required if the *locus* of the claim is not so fixed in the published notice. Broad Ax Lode, 22 L. D. 244.

43. A notice of application for a mineral patent that fails to connect the claim with the public surveys or a United States mineral monument is insufficient, and an entry allowed on such notice may not be referred to the Board of Equitable Adjudication in the presence of a protest of persons alleging adverse claims, but republication of notice will be required. Nil Desperandum Placer, 10 L. D. 198.

44. Where by a typographical error the line connecting the claim with a public survey corner was published as 2552.2 feet in length, instead of 2252.2 feet, the mineral entry may be referred to the Board of Equitable Adjudication. Newport Lode, 6 L. D. 546.

45. Where by error in the survey of a mining claim the line connecting the claim was so erroneous as to place the claim about half a mile from its true position, it was held that the mineral entry should be referred to the Board of Equitable Adjudication without requiring republication of notice of application. Buena Vista Lode, 6 L. D. 646; Veta Grande Lode, 6 L. D. 718.

46. Any defect in the published notice of application for a mineral patent is chargeable to the Register, whose duty it is to prepare and publish the same, and an entry may be referred to the Board of Equitable Adjudication where such notice is defective in failing to connect the claim with a corner of the public surveys or a United States mineral monument. Mimbres M. Co., 8 L. D. 457.

47. A new patent will be issued in lieu of one issued upon an incorrect survey only after new notice by publication and posting, correctly describing the claim. United States v. Rumsey, 23 L. D. 101.

48. Where a lode claim and a mill site appurtenant thereto are embraced in one survey and in one application for patent, the survey of the mill site need not be connected with a corner of the public surveys or a United States mineral monument, if connected with the survey of the lode claim, and in such a case it is not incumbent upon the claimant to show an expenditure of $500 upon the mill site, its use or occupancy for mining or milling purposes in connection with the lode claim being sufficient to entitle claimant to ask for a patent therefor. Alta Mill Site, 8 L. D. 195.

49. Paragraphs 50 and 51 of the Mining Regulations were originally published in a circular dated December 4, 1884, 3 L. D. 540. (See page 138 of this book.) By circular of May 11, 1885, it was ordered that if the survey was made prior to the issuance of said circular of December 4, 1884, and was free from objections under the former practice, an amended survey to comply with the requirements of said circular need not be made. 12 C. L. O. 51. See to same effect, Range View Lode, 7 L. D. 318.

50. Circular of December 4, 1884 (paragraphs 50 and 51 of Mining Regulations, page 188 of this book), applied in the following cases: Engineer M. & Dev. Co., 8 L. D. 361; Plevna Lode, 11 L. D. 236; Consolidated M. Co., 11 L. D. 250; Correction Lode, 15 L. D. 67; Michael Howard, 15 L. D. 504.

51. The provisions of the circular of December 4, 1884, will not be applied to cases where entry was made prior to receipt of said circular by the local land office (Circular of May 11, 1885, 3 L. D. 542), nor even where application for patent was filed and publication begun before the receipt of said circular by the local office. Circular February 16, 1887, 5 L. D. 468.

52. The provisions of paragraphs 50 and 51 of Mining Regulations (circular of December 4, 1884), relative to the establishment of end lines of a survey within excluded claims, are not applicable where the conflict was claimed and applied for, the exclusion being the result of adverse proceedings against the application. In such case an amended survey will not be required. Com'r, June 14, 1895, Instructions to Surveyor General at Denver, Colo.

53. For the purpose of including ground claimed under a lode location, valid when made, and any veins or lodes the tops or apexes of which may be situated thereon, the end line of the lode claim may be established within a patented placer claim under the same principle as is laid down in paragraphs 50 and 51 of the Mining Regulations for conflicting lode claims. Black Diamond Lode, 22 L. D. 284.

54. The end line of a lode claim must be established at the point where the lode applied for passes within a prior excluded location. Consolidated M. Co., 11 L. D. 250.

55. The survey of a mining claim must not be extended into an excluded agricultural claim. Bi-metallic M. Co., 15 L. D. 309.

56. A triangular plat of a lode claim will not be allowed unless it be shown that the vein intersects and fills the point of the acute angle. Fred C. Morse, 5 C. L. O. 178.

57. The fact that surrounding claims are patented will not relieve a claimant from compliance with the law by making the end lines of the claim parallel. Com'r to C. M. Foster, Oct. 26, 1891. *Contra*, Com'r to Surveyor General of California, Feb. 20, 1892, *In re* Little Scottie Lode.

58. A lode mining claim should be so surveyed as to leave no doubt as to which lines are to be considered as the end lines of the claim. Com'r to Surveyor General of New Mexico in case of Sterling Price Lode, 10 C. L. O. 86.

59. The statutory direction, to the effect that the end lines of a lode claim must be parallel, should be generally followed; but under the peculiar circumstances of this case it may be waived. (One survey had been made and another was rendered practically impossible by the presence of hostile Indians.) Secretary Teller, May 26, 1882, *In re* Sterling Price Lode, on appeal, reported as the case of W. H. Henry, 10 C. L. O. 102.

60. A lode claim may not exceed in length the lode on which it is located. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

61. "However tortuous might be the course of the lode, the claimant had perfect right to follow it up and prepare his diagram so as to include it, together with the surface-ground on each side thereof allowed by local laws. There is no language in the acts that requires the diagram to be in the form of a parallelogram or in any particular form." Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

62. There must be substantial compliance with law as to length of claim. *Quære:* Whether a claim excessive in length would be good as to fifteen hundred feet, or entirely void for uncertainty? Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. Rep. 714.

63. A location of a lode need not be a parallelogram, but may follow the course of the lode, whether that be straight or tortuous. (This principle applied to the facts in this case gives a decision contrary to the case of Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196; 15 Mor. Min. Rep. 641.) Breece Mining Co., 3 L. D. 11. See to same general effect, Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

64. The length of a lode location is limited by law to fifteen hundred feet, and the area bounded by the location stakes must be within that limit, and a location of a greater length is void in its entirety. Leggatt v. Stewart, 5 Mont. 107; 2 Pac. Rep. 320; 15 Mor. Min. Rep.

358. (Following Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. Rep. 714.)

65. The lines of a survey must necessarily conform to the course of the vein and not to congressional surveys. Reynolds v. Iron Silver M. Co., 116 U. S. 687.

66. Surveys to segregate mineral from agricultural land should be made only by direction of the General Land Office. Com'r to Surveyor General of California, May 21, 1892.

67. A survey to segregate a mining claim from agricultural land may be made at the expense of an agricultural claimant desirous of entering the land. Walter Bond, 18 L. D. 418.

68. The owner of an unsurveyed mining claim in conflict with an agricultural entry, and which the Land Department holds should be excluded from the agricultural entry, must have an official survey of his claim made. Winters v. Bliss, 14 L. D. 59.

69. Where an agricultural entry is shown to embrace a valid mining claim, the agricultural claimant must have a survey made at his expense, under the direction of the Surveyor General, segregating the mineral from the agricultural land. Darragh v. Holdman, 11 L. D. 409.

70. Where, upon a contest, it is decided that the land in conflict between an agricultural entry and an unsurveyed mining claim is mineral in character, a segregation survey must be made at the expense of the mineral claimant. Creswell M. Co. v. Johnson, 8 L. D. 440.

71. The failure of mineral claimants to comply with a Departmental order, and show by a segregation survey the extent of an alleged conflict with an agricultural entry, warrants the conclusion, in the disposition of said entry, that no such conflicts exist. Winters v. Bliss, 19 L. D. 287.

72. An agricultural claimant who relinquishes the ground in conflict with an unsurveyed mining claim must have a survey made, segregating such mining claim from his agricultural claim. Departmental decision of June 13, 1896, *In re* Arthur Chambers.

73. Where the owner of a mining claim in conflict with a homestead entry secures the cancellation of the homestead entry as to the conflict because of the mineral character of the land, he must have a survey made, segregating his mining claim from the agricultural claim. Creswell M. Co. v. Johnson, 8 L. D. 440; S. C. on review, 8 L. D. 443.

74. Where a placer claim is described as consisting of a certain part of an irregular, fractional lot, a survey thereof may be required, if necessary, to definitely fix the boundaries and extent of the claim. G. A. Khern, 6 L. D. 580.

75. An entry of a placer claim may be patented where the land entered is described as certain portions of lots (as the N. E. ¼ of lot 1 of a certain section), as the excess or deficiency of area will be taken to fall upon the north and west sides of the fractional lot. Com'r to Redding Office, July 18, 1896, *In re* Ten Per Cent Placer. *Contra*, Com'r to Leadville Office, August 21, 1896, *In re* Monitor No. 1 Placer.

76. The land remaining in a forty-acre subdivision after the deduction of the areas of mining claims should be given a lot number by the Surveyor General. George B. Foote, 9 C. L. O. 113.

77. The failure of government surveyors to segregate mineral from agricultural lands cannot operate to the injury of occupant miners. Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

78. A hearing may be allowed for the submission of evidence in explanation of an apparent discrepancy between the survey and the claim as marked out on the ground and described in the location. Emma Lode, 7 L. D. 169.

79. A hearing may be had to identify the claim as surveyed with the claim as located. Jackson v. Dyer, 8 C. L. O. 8.

80. Inaccuracies in surveys of mining claims may be investigated through the office of the Surveyor General, not by a hearing. St. Lawrence M. Co. v. Albion Cons. M. Co., 4 L. D. 117.

81. An actual survey must be made of the entire adverse claim. An adverse claimant is not permitted to color a portion of the applicant's survey and treat it as his entire adverse claim. Bates v. Chambers, 1 C. L. O. 98.

82. If it is impossible to make a survey to show the boundaries of an adverse claim, its absence may be waived if the conflict is shown as nearly as practicable from information available. J. S. Wallace, 1 L. D. 582.

83. The nature and extent of an adverse claim may be shown by unofficial survey if it is impracticable to obtain an official survey by a United States Deputy Mineral Surveyor. Hoffman v. Beecher, 31 Pac. Rep. 92.

84. The fact that a survey made for the purpose of showing the boundaries and extent of an adverse claim is slightly erroneous will not invalidate the adverse claim. Hoffman v. Beecher, 31 Pac. Rep. 92.

85. An adverse complaint should allege all material facts as to plaintiff's ownership, that application for patent has been filed by defendant, that suit is based on adverse claim duly filed, and should show conflict between claims. Cronin v. Bear Creek Gold M. Co., 32 Pac. Rep. 204; Mattingly v. Lewisohn, 8 Mont. 259; 19 Pac. Rep. 310; Anthony v. Jillson, 85 Cal. 296; 23 Pac. Rep. 419.

86. An application to make mineral entry by a successful adverse claimant must be accompanied by official plat and field-notes describing the tract awarded him, and by a certificate of the United States Surveyor General of an expenditure of $500 upon the tract sought to be entered. Albert F. Harsh, 2 L. D. 706.

87. An applicant for patent may abandon the part adversely claimed, and after survey receive a patent for the part not in controversy. Fairmount G. & S. M. Co., 1 C. L. O. 82.

88. "The last position of the court below, that the owner of contiguous locations who seeks a patent must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been performed is as untenable as the rulings already considered." St. Louis Smelting Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

89. Where several contiguous mining claims are owned in common they may be embraced in one survey. Good Return M. Co., 4 L. D. 221; S. F. Mackie, 5 L. D. 199; Circular, March 24, 1887, 8 L. D. 505.

90. "While the law prescribes a limitation to the size of a single location, there is no limitation to the number of claims one person may hold by purchase, or that may be inclosed in a single patent, and as I understand, that may be included in a single survey, showing only the exterior boundaries, and omitting all interior lines of the several smaller claims." Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597. (Citing Polk's Lessee v. Wendall, 9 Cranch, 87; St. Louis Sm. Co. v. Kemp, 104 U. S. 636.)

91. Where several contiguous locations are embraced in one survey, the boundaries of every separate location must be shown. S. F. Mackie, 5 L. D. 199; Golden Sun M. Co., 6 L. D. 808.

92. Where several locations are embraced in one survey, the corners of every location should be numbered, commencing in every case with No. 1. Topography should not be shown on the plats of mineral surveys. Com'r to Surveyor General of South Dakota, March 31, 1892, and to Surveyor General of Colorado, April 7, 1892.

93. Where separate applications and entries are made for the several locations surveyed as one claim, the claimant may file a new application for the consolidated claim and make a new entry therefor *nunc pro tunc*. Frederick A. Williams, 15 L. D. 532.

94. Though placer claims on surveyed lands are required to conform, "as near as practicable," with legal subdivisions, they may be located along a stream or canyon, as it is not the intent of the law to compel the placer claimant to take land unfit for mining. William Rablin, 2 L. D. 764.

95. A placer entry of a long narrow strip of land covering a stream of water on surveyed land, held to conform as near as reasonably practicable with the public surveys, where it was shown that the surrounding land was valueless for mining. (In this case four entries covered a strip of land from five to five hundred feet wide and about eighteen miles long.) Pearsall & Freeman, 6 L. D. 227.

96. A location of a placer claim by legal subdivisions must be made to conform therewith in the matter of exact description of the land as shown by the township plat. Fractional subdivisions designated by the United States Surveyor General as lots must be so described. Reins v. Murray, 23 L. D. 409.

97. The plats of mineral surveys, prepared for the claimant, the local land office and the General Land Office should all be signed by the Surveyor General, all being originals. Blue-print copies should not be made instead of originals. Com'r to Surveyor General of New Mexico, Sept. 17, 1891.

98. It cannot be objected that any plats or field-notes are copies and not originals in a

mining case, as four plats and field-notes in duplicate are prepared by the Surveyor General. Juniper Mine, 4 C. L. O. 115.

99. The approved plat of survey of a mining claim must show the date of location of the claim. Hall v. Street, 3 L. D. 40.

100. Expenditure of $500 must be shown upon the plat and field-notes of all mining claims. Com'r to Surveyor General, March 10, 1874, 1 C. L. O. 2.

101. No plat of a lode discovered in a tunnel will be made until the exact surface ground is ascertained. William L. Campbell, 4 C. L. O. 102.

102. The plat of survey which is part of the patent is often entitled to as much, and perhaps more, weight than the courses and distances. Serrano v. Rawson, 47 Cal. 55.

103. An approved mineral survey may be amended only by direction of the General Land Office. Com'r to Surveyor General of Utah, Nov. 10, 1891.

104. During the pendency of a suit based upon an adverse claim against a mineral application, an amended survey of the claim applied for will not be ordered. Com'r to Surveyor General of Colorado, May 18, 1893, *In re* Comstock Lode, and June 26, 1896, *In re* Mollie C. Lode.

105. If the survey of a mining claim is found to be erroneous, and the Deputy Surveyor by whom it was made has since ceased to occupy that position, claimant must have the amended survey made by another Deputy at his own expense. Com'r to Surveyor General of Montana, Dec. 10, 1891.

106. If an amended survey or a resurvey is required, through the fault of the Deputy Surveyor, he must bear the expense thereof. Com'r to Surveyor General of Colorado, April 8, 1895, *In re* New York Lode, and July 30, 1895, *In re* Oranoke Lode.

107. Where a survey which is not in accordance with the law and regulations is approved by the United States Surveyor General, if an amended survey is ordered, the claimant should not be required to make another deposit for office work, and the Deputy Surveyor must do the necessary field work without expense to the claimant. Edward Hickey, 9 C. L. O. 168.

108. Errors in the sworn field-notes of a Deputy United States Mineral Surveyor should be corrected by him. Com'r to Surveyor General at San Francisco, Cal., Dec. 11, 1878, 5 C. L. O. 162.

109. In requiring an amended survey of an entered mining claim, the General Land Office should direct that claimant be allowed a certain time within which to take proper steps, under penalty of cancellation of the entry. Vanderbilt Lode, 16 L. D. 105.

110. Where a mineral patent issues based on an erroneous survey, a new patent in lieu thereof may not be issued without new notice, based on a correct survey, where the original survey is so erroneous as not to cover any portion of the claim. If such patentee refuses to surrender the erroneous patent, and to reconvey the land covered thereby, suit to vacate patent will be recommended by the Land Department. United States v. Rumsey, 22 L. D. 101.

111. The Surveyor General has no authority to have made a resurvey of a patented mining claim because of errors in the survey made the basis of the description in the patent. Com'r to Surveyor General of California, May 2, 1891.

112. Where the survey of a mining claim, and the published notice based thereon are erroneous in describing the claim as being in a county other than the one in which it is actually situate, to the injury of adverse claimants, an amended survey and republication will be required. Henry v. Castner, 17 L. D. 565.

113. An application for a lode patent was made by A. B., the owner of a conflicting lode claim, filed an adverse claim and commenced suit thereon, alleging prior location of the ground in conflict. A. filed an answer, but thereafter amended the survey of his claim by so shortening it as to eliminate from it all conflict with the claim of B., and was allowed to make entry in the land office of the reduced area. He then withdrew his answer, and B., on testimony submitted, secured judgment for the land in controversy. *Held:* (1) That the withdrawal of the answer and abandonment of the application for patent as to the conflict did not remove the cause from the jurisdiction of the court. (2) That, in view of the first holding, the judgment is conclusive as between A. and B. of the priority of the location of B. Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683.

114. Land surveyed prior to the admission of a State, and known to contain coal at the date of such admission, does not pass under a grant of school lands to the State. State of Montana v. Buley, 23 L. D. 116.

115. A State admitted before the survey of lands is entitled to sections 16 and 36 under its school grant if they are not known to be mineral at date of the approval of the survey, and a discovery of mineral thereon subsequently will not defeat the right of the State. The State acquires no rights, however, by an irregular survey which is approved and thereafter suspended. Virginia Lode, 7 L. D. 459; Town Site of Silver Cliff v. State of Colorado, 6 C. L. O. 152; J. Dartt, 5 C. L. O. 178; State of Colorado, 6 L. D. 412; 7 L. D. 490.

116. The right of the State under a school grant attaches, as to non-mineral lands previously surveyed, at date of the admission of the State. As to non-mineral lands surveyed subsequent to the admission of the State, the right attaches at date of approval of the survey. Warren v. State of Colorado, 14 L. D. 681.

117. The mineral or non-mineral character of land in a school section (surveyed before the admission of the State) as known at the date of the admission of the State determines whether or not it passed to the State under its grant. Boulder & Buffalo M. Co., 7 L. D. 54.

118. Where a grant of land is made to a State after its admission, the mineral or non-mineral character at date of the subsequent survey thereof determines whether or not it passed to the State under the grant. Pereira v. Jacks, 15 L. D. 272.

119. To be excepted from a grant of school lands to a State, land must have been known to be valuable for mineral as a fact at the date of the approval of the survey thereof when the State was admitted prior to such survey. Frees v. State of Colorado, 22 L. D. 510.

120. "The length of every line run in the survey of a mining claim is to be ascertained by precise horizontal measurement, as nearly approximating an air line as is possible." Com'r to P. Rasmusser, Oct. 4, 1892.

121. The Surveyor General is prohibited from "expediting the examination of mineral surveys in his office by allowing his employees to work outside of office hours for extra compensation given by claimants." Com'r to Surveyor General of Utah, April 9, 1892.

122. No part of a mineral entry can stand if made on a false survey and publication. Gustavus Hagland, 1 L. D. 593.

123. The position of corners of the claim as found on the ground should be shown by the plat and field-notes of a mineral survey. Com'r to Surveyor General of Nevada, 1 L. D. 581.

124. The survey of a mining claim must show location lines. Philip Dephanger, 8 C. L. O. 189.

125. The survey of a mining claim must be within the lines of the location as marked on the ground. Com'r to Surveyor General or Arizona, Oct. 31, 1891, *In re* Homestake Lode.

126. The survey of a patented mining claim or town site is a public survey. Eugene McCarthy, 14 L. D. 105. (But see S. C. on review, 14 L. D. 294.)

127. A survey under the mining act does not withdraw the land from sale unless followed by application for patent. William L. Campbell (2), 4 C. L. O. 35.

128. The survey of a mining claim should properly show the conflicts with prior surveys, and when the ground claimed is shown, it should be that described by the applicant, as neither the Deputy nor the Surveyor General has authority to require an applicant to include or to exclude from his claim any portion or any particular tract even if within his own knowledge the same has been otherwise appropriated. His power in this respect is advisory only. Com'r to Surveyor General of Colorado, Jan. 7, 1889, 15 C. L. O. 255.

129. The United States Surveyor General may not require a claimant to exclude land from the claim surveyed. Antediluvian Lode & Mill Site, 8 L. D. 602.

130. The Surveyor General has no authority to determine questions of title in mining property. Thor Mine, 5 C. L. O. 51; J. H. Russell Lode, 5 C. L. O. 18.

131. A report should be made by the United States Deputy Mineral Surveyor on all placer claims surveyed by him as to soil, timber, streams, proximity of the claim to centers of trade or residence, and to lodes, adaptability for placer mining, water supply, improvements, etc. Circular of Sept. 22, 1882, 1 L. D. 685.

132. An examination of a placer claim and report thereon by an United States Deputy Mineral Surveyor under circular of September 22, 1882, at the expense of the applicant for patent is not required where the claim is taken by legal subdivisions. Rosina T. Gerhauser, 7 L. D. 390.

133. The report of a Deputy Mineral Surveyor, who examines a placer mining claim in his official capacity, which shows the land to be mineral in character, overcomes the slight presumption raised by its return by the Surveyor General as agricultural in character, and places the burden of proof upon one alleging its non-mineral character. State of Washington v. McBride, 18 L. D. 199.

134. Though several contiguous locations owned in common may be embraced in one survey (S. F. Mackie, 5 L. D. 199), if the consolidated claim, in the survey thereof, becomes two or more tracts not joined by the boundary line of a claim, such tracts may not be embraced in one survey and application. Com'r to Surveyor General of California, Oct. 28, 1891, *In re* Champion Consolidated Mine.

135. In the absence of a contrary showing it will be assumed that that portion of the vein on which the discovery shaft is sunk is the middle of the vein from which surface ground on each side is to be measured. Hope M. Co., 5 C. L. O. 116.

136. The fact that the location of a mining claim may have been defective in that it was not made in accordance with the mining district rules as to width of the claim and the record of location notice is rendered immaterial by the repeal and annulment of such rules prior to allowance of mineral entry. Walter C. Childs, 10 L. D. 173.

137. The measurement of the width of a mining claim should begin from the outer walls of the lead, and not from the center of the lead itself. (Act of Montana, 1864. But see sec. 2320, U. S. Rev. Stat.) Foote v. National M. Co., 2 Mont. 402; 9 Mor. Min. Rep. 605.

138. It is presumed by the Land Department, in the absence of a contrary showing, that the lode extends in a straight line through the center of a surveyed claim. Bi-metallic M. Co., 15 L. D. 309.

139. The Surveyor General should certify that the field-notes and plat of a mineral survey are correct and contain sufficient data to definitely fix the *locus* thereof, and that $500 has been expended thereon by claimant or his grantors. Circular, Nov. 20, 1878, 1 C. L. O. 18.

140. The Surveyor General should be satisfied that the required expenditure has been made on a mining claim, and may call for additional evidence. J. H. Russell Lode, 5 C. L. O. 18.

141. Patent was issued based on an erroneous survey, but the notice of application for patent was so nearly correct as to be sufficient to put adverse claimants on their guard. In view of these facts, on the filing of a quitclaim deed of the patented land from the present owner to the United States, together with an abstract of title, a new and correct patent may be issued in the name of the original patentee without requiring republication. W. C. Childs, 18 C. L. O. 53.

142. The effect of an entry as regards third parties is not altered by reason of a defect in the survey which caused a temporary suspension of the entry by the Land Department. Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683; 61 Fed. Rep. 557; 15 U. S. App. 456.

143. Coal lands are disposed of only by legal subdivisions. *Hence* a coal claim should not be made the subject of a mineral survey. Com'r to Deputy R. E. Hurst, Dec. 27, 1892.

144. A survey may be procured under the "special deposit" system by coal claimants. Circular August 7, 1895, 21 L. D. 88.

145. Public land cannot be considered as being surveyed until the plat thereof has been filed in the local land office. Buxton v. Traver, 130 U. S. 232; United States v. Curtner, 38 Fed. Rep. 1.

146. An appeal may be taken from the action of the Surveyor General in approving a survey. Instructions to Surveyor General of Colorado, Nov. 5, 1874, 1 C. L. O. 188.

147. Applications for patent should be received at the local office in order of time — not according as surveys are approved. Big Flat Gravel M. Co., 1 L. D. 562.

148. Where a survey of a mining claim has been made upon unsurveyed lands, in extending the public surveys the Surveyor General will adjust the same to the boundaries of such surveyed claims. Com'r to Surveyor General of Colorado, Jan. 7, 1889, 15 C. L. O. 255.

149. A county surveyor has no authority of law for removing an original corner established by a Deputy Mineral Surveyor. Com'r to Adam Diller, 1 C. L. O. 42.

150. It is not the policy of the law to hold miners to accuracy in the record of location, as, under the law, an absolutely correct certificate of location cannot be made without the aid of a surveyor, whose services it is generally impracticable to obtain. McEvoy v. Hyman, 25 Fed. Rep. 596; 15 Mor. Min. Rep. 397.

151. A patent is not void if the claim patented may be identified by monuments therein referred to, even if the course and length of the lines of survey of the claim are erroneous. Cullacott v. Cash G. & S. M. Co., 8 Colo. 179; 6 Pac. Rep. 211; 15 Mor. Min. Rep. 392.

152. Suit to vacate should be recommended if a mineral patent was issued upon an incorrect survey. United States v. Rumsey, 22 L. D. 101.

153. Extra-lateral rights of a patentee depend on actual course and position of vein, not on the course and position indicated on the patent survey. Consolidated Wyoming M. Co. v. Champion M. Co., 62 Fed. Rep. 540.

154. The right to an order for inspection and underground survey of mines discussed. St. Louis M. & M. Co. v. Montana Co., 28 Pac. Rep. 510. (Citing East India Co. v. Kynaston, 3 Bligh, 153; Lonsdale v. Curwen, 3 Bligh, 170; Walker v. Fletcher, 3 Bligh, 172; Blakesley v. Whieldon, 1 Hare, 176; Lewis v. Marsh, 8 Hare, 97; Bennett v. Griffiths, 30 Law J. Q. B. 98; Whaley v. Brancker, 10 L. T. N. S. 155; Thornburg v. Mining Co., 1 Pac. Law Mag. 267; Bainbridge on Mines; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Thomas Iron Co. v. Allentown M. Co., 28 N. J. Eq. 77; Bennett v. Whitehouse, 28 Beav. 119; Blue Bird M. Co. (Limited) v. Murray, 23 Pac. Rep. 1022.

2. *United States Deputy Mineral Surveyors.*

155. The matter of the appointment of United States Mineral Surveyors is a matter in which the discretion of the United States Surveyor General will be recognized. William E. Jacobs, 21 L. D. 379.

156. The action of the United States Surveyor General in suspending or revoking the appointments of United States Deputy Surveyors should be submitted by the Surveyor General to the General Land Office. Robert Gorlinski, 20 L. D. 283.

157. A Deputy Mineral Surveyor may hold a commission in more than one State. Charles W. Helmick, 20 L. D. 163. (Revoking S. C., 18 L. D. 601.)

158. Surveyors who are under contract to survey public land should not be commissioned, "but should receive an appointment for the execution of each contract. This does not apply to Deputy Mineral Surveyors." Com'r to Surveyor General of California, March 24, 1886. (Report of General Land Office of 1886, page 280.) Com'r to Surveyor General of New Mexico, October 14, 1892.

159. A Deputy Mineral Surveyor is required to give a bond in the sum of $10,000 for the faithful performance of his official duties. This bond must be approved by the Commissioner of the General Land Office. Circular of November 13, 1877, Copp's Min. Lands (2d ed.), 61; 5 C. L. O. 35.

160. A bondsman of a Deputy Mineral Surveyor should not be allowed to disclaim arbitrarily further responsibility for the acts of the Deputy, but the Deputy should be allowed to furnish a new bond. Com'r to Surveyor General of Montana, Sept. 10, 1894. See, also, 7 Opp. Atty. Gen. 62.

161. A Deputy Mineral Surveyor may make mineral land entries, but in that event he cannot act in any other capacity than a claimant. A Deputy Mineral Surveyor cannot survey a claim and act as notary public in the same case. Dennison & Willets, 11 C. L. O. 261.

162. A mineral entry may be made by a United States Deputy Mineral Surveyor within the land district for which he is appointed. Lock Lode, 6 L. D. 105.

163. A Deputy United States Surveyor, under contract to survey public land for the government, is prohibited by section 452, United States Revised Statutes, from making an entry of public land. Müller v. Coleman, 18 L. D. 394.

164. A Deputy Mineral Surveyor should not take contracts to survey and secure patents for mining claims, as he should not act in the double capacity of surveyor and attorney in the same case. Com'r to Surveyor General of Montana, March 29, 1892.

165. The United States Deputy Mineral Surveyor by whom a mineral survey is made should not appear in the case in any other capacity, not even as a notary public. Dennison & Willets, 11 C. L. O. 261; Clinton Gurnee, 13 L. D. 608.

166. There is no objection to the holding, by a Deputy Mineral Surveyor, of the office of notary public under the local authority; but by the rulings of this office, based on considerations of public policy, the Deputy who surveys a mining claim in the employ of the claimant is not permitted to act also as notary public in matters pertaining to the same claim. Com'r to Surveyor General of Montana, Jan. 20, 1890, 16 C. L. O. 269.

167. The report of the United Stated Deputy Mineral Surveyor should show the value of improvements placed upon the claim by claimants or their grantors. Improvements made by other parties should not be credited to the claim. Circular, Nov. 20, 1873, 1 C. L. O. 13.

168. Instructions to Deputy Mineral Surveyors in States where the Commissioner of the General Land Office is *ex officio* Surveyor General. Smith Scogin, 2 C. L. O. 84.

169. A United States Mineral Surveyor has no authority to make a survey of a claim outside of the State or Territory for which he is appointed. Com'r to W. W. Seawell, Aug. 6, 1872.

170. A Deputy Mineral Surveyor who is found to be incompetent or careless in the performance of his duties should be dropped from the rolls. Com'r to Surveyor General of Montana, May 7, 1892.

3. *Manual of Surveying.*

["MANUAL OF INSTRUCTIONS FOR THE SURVEY OF THE MINERAL LANDS OF THE UNITED STATES," ISSUED BY THE GENERAL LAND OFFICE OCTOBER 25, 1895.]

GENERAL PROVISIONS.

1. Under section 2334, U. S. Rev. Stat. *(see Appendix B hereof), the United States Surveyor General "may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims."

2. Capable parties desiring such appointments should therefore file their applications with the Surveyor General for the district wherein appointment is asked, who will furnish all information necessary.

3. Deputies may at the same time hold commissions in more than one State or land district. (20 L. D. 163.)

4. All appointments of deputy mineral surveyors must be submitted to the Commissioner of the General Land Office for approval.

5. The Surveyors General have authority to suspend or revoke the commissions of their deputy mineral surveyors for cause. Before final action, however, the matter should be submitted to the Commissioner of the General Land Office for approval.

Deputies will be allowed the right of appeal from the action of the Surveyor General in the usual manner. Such appeal should be filed with the Surveyor General, who will at once transmit the same, with a full report, to the General Land Office. (20 L. D. 283.)

6. Neither the Surveyor General nor the Commissioner of the General Land Office has jurisdiction to settle differences, relative to the payment of charges for field work, between deputy mineral surveyors and claimants. These are matters of private contract and must be enforced in the ordinary manner, *i. e.*, in the local courts.

The Department has, however, authority to investigate charges affecting the official actions of deputy mineral surveyors, and will, on sufficient cause shown, suspend or revoke absolutely the commission of the deputy.

7. The Surveyors General should appoint "as many" competent deputy mineral surveyors as apply for appointment, in order that claimants may have a choice of deputies and be enabled to have their work done on the most advantageous terms.

8. The schedule of charges for office work should be as low as is possible. No additional charges should be made for orders for amended surveys, unless the necessity therefor is clearly the fault of the claimant, or considerable additional office work results therefrom.

In cases where the error in the original survey is due to the carelessness or neglect of the deputy mineral surveyor who made it, he should be required to make the necessary corrections in the field at his own expense, and the Surveyor General should advise him that the penalty for failure to comply with instructions within a specified time will be the suspension or revocation of his commission.

*Appendix B, as printed in the Manual, is not given in this book. For section 2334 see page 335.

9. These instructions are subject to the limitations of section 2324, U. S. Rev. Stat., so far as the same refers to local laws and customs.

INSTRUCTIONS FOR SURVEYS.

1. All official communications must be addressed to the Surveyor General.* You will always refer to the date and subject-matter of the letter to which you reply, and when a mineral claim is the subject of correspondence, you will give the name and survey number.

2. You should keep a complete record of each survey made by you, and the facts coming to your knowledge at the time, as well as copies of all your field notes, reports, and official correspondence, in order that such evidence may be readily produced when called for at any future time.

3. Field notes and other reports must be written in a clear and legible hand or typewritten, in noncopying ink, and upon the proper blanks furnished you gratuitously by the Surveyor General's Office upon application therefor. *No interlineations or erasures* will be allowed; and no abbreviations or symbols must be used, except such as are indicated in the specimen field notes.

4. No return by you will be recognized as official, unless it is over your signature as a U. S. deputy mineral surveyor, and made in pursuance of a special order from the Surveyor General's Office. After you have received an order for survey, you are required to make the survey, and return correct field notes thereof to the Surveyor General's Office without delay.

5. The claimant is required, in all cases, to make satisfactory arrangements with you for the payment for your services and those of your assistants in making the survey, as the United States will not be held responsible for the same. You will call the attention of applicants for mineral survey orders to the requirements of paragraph 14 of the circular, Appendix A. †(Sec. 2334, U. S. Rev. Stats.; Par. 98, Mining Circular, December 10, 1891. See Appendix B hereof.)

6. You will promptly notify the Surveyor General's Office of any change in your postoffice address. (20 L. D. 163.)

NOT TO ACT AS ATTORNEY.

7. You are precluded from acting, either directly, or indirectly, as attorney in mineral claims. Your duty in any particular case ceases when you have executed the survey and returned the field notes and preliminary plat, with your report, to the Surveyor General. You will not be allowed to prepare for the mining claimant the papers in support of his application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim. You are not permitted to combine the duties of surveyor and notary public in the same case by administering oaths to the parties in interest, but as a notary public you may administer the oaths to your assistants in making the survey. Otherwise you must have absolutely nothing to do with the case, except in your official capacity as surveyor. You will make no survey of a mineral claim in which you hold an interest, nor will you employ chainmen interested therein in any manner. ‡(Par. 101, Mining Circular, December 10, 1891. See Appendix B hereof; 13 L. D. 608.)

THE FIELD WORK.

8. The survey made and reported must, in every case, be an actual survey on the ground in full detail, made by you in person after the receipt of the order, and without reference to any knowledge you may have previously acquired by reason of having made the location survey or otherwise, and must show the actual facts existing at the time. This precludes you from calculating the connections to corners of the public survey and location monuments, or any other lines of your survey through prior surveys made by others, unless it is satisfactorily shown in your report that you have retraced such lines and found them to be correct. (6 L. D. 718; 7 L. D. 81.)

The term *survey* in these instructions applies not only to the usual field work but also to the examinations required for the preparation of your affidavits of $500 expenditure, descriptive reports on placer claims, and all other reports.

SURVEY AND LOCATION.

9. The survey of a mining claim may consist of several contiguous locations, but such survey must, in conformity with statutory re-

* For list of Surveyors General in mining districts, see page 172 of this book. † Page 336. ‡ Page 336.

quirements, distinguish the several locations, and exhibit the boundaries of each. (5 L. D. 199; 6 L. D. 808.)

10. The survey must be made in strict conformity with, or be embraced within, the lines of the location upon which the order is based. If the survey and location are identical, that fact must be clearly and distinctly stated in your field notes. If not identical, a bearing and distance must be given from each established corner of the survey to the corresponding corner of the location, and the location corner must be fully described, so that it can be identified. The lines of the location, as found upon the ground, must be laid down upon the preliminary plat in such a manner as to contrast and show their relation to the lines of survey. (1 L. D. 581.)

11. In accordance with the principle that courses and distances must give way when in conflict with fixed objects and monuments, you will not, under any circumstances, change the corners of the location for the purpose of making them conform to the description in the record. If the difference from the location be slight, it may be explained in the field-notes.

"The act of Congress of May 10, 1872, expressly provides that 'the location must be distinctly marked upon the ground so that its boundaries can be readily traced,' and 'that all records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim.'" *(Sec. 2324, U. S. Rev. Stats. See Appendix B herewith.)

"These provisions of the law must be strictly complied with in each case to entitle the claimant to a survey and patent, and, therefore, should a claimant under a location made *subsequent* to the passage of the act of May 10, 1872, *who has not complied with said requirements in regard to marking the location upon the ground and recording the same, apply for a survey, you will decline to make it.*" (1 L. D. 581.)

You will then report the facts to this office and await further instructions.

Should the survey be applied for under a location made prior to May 10, 1872, or under section 2332, U. S. Rev. Stat., in making the survey thereof you will be governed by the special instructions accompanying the order for survey.

No mining claim located subsequent to May 10, 1872, should exceed the statutory limit in width on each side of the center of vein, or 1,500 feet in length, and all surveys must close within 50–100 feet in one thousand feet, and the error must not be such as to make the location exceed the statutory limit, and in absence of other proof the discovery point is held to be the center of the vein on the surface. The course and length of the vein should be marked upon the plat.

INSTRUMENT.

12. All mineral surveys must be made with a TRANSIT, provided with a solar attachment, by which the meridian can be determined independently of the magnetic needle, and all courses must be referred to the true meridian. The variation should be noted at each corner of the survey.

THE TRUE MERIDIAN.

12*b*. The true course of at least one line of each survey must be ascertained by astronomical observations made at the time of the survey; the data for determining the same and details as to how these data were arrived at must be given. Or, in lieu of the foregoing, the survey must be connected with some line, the true course of which has been previously established beyond question, and, in a similar manner, by yourself, and, when such lines exist, it is desirable in all cases that they should be used as a proof of the accuracy of subsequent work. (For methods for determining the true meridian, see pages 84 to 119 inclusive, General Surveying Manual, 1894.)

CONNECTIONS.

13. Connect corner No. 1 of each location embraced in your survey by course and distance with nearest corner of the public survey or with a United States location monument, if the claim lies within two miles of such corner or monument. If both are within the required distance, you must connect with the nearest corner of the public survey. (7 L. D. 475; †Par. 45, Circular December 10, 1891 — Appendix B herewith.)

(*a*) You will make surveys and connections of mineral claims in suspended townships so long as they remain suspended, in the same

*Page 70. †Page 137.

manner as though the claims were upon unsurveyed land, except as hereinafter specified, by connecting them with independent mineral monuments. At the same time, you will note the position of any public-land corner which may be found in the neighborhood of the claim, so that, in case of the release of the township plat from suspension, the position of the claim can be shown on the plat.

(*b*) A mineral survey must not be returned with its connection made only with a corner of the public survey, where the survey of the township within which it is situated is under suspension, nor connected with a mineral monument alone, when situated within the limits of a township, the regularity and correctness of the survey of which is unquestioned.

(*c*) In making an official survey hereafter you will establish corner No. 1 of each location embraced in your survey at the end nearest the corner of the public survey or locating monument, unless good cause is shown for its being placed otherwise. If connections are given to both a corner of the public survey and location monument, corners Nos. 1 should be placed at the end nearest the corner of the public survey.

14. When a boundary line of a claim intersects a section line, give courses and distances from point of intersection to the government corners at each end of the half mile of section line so intersected.

LOCATION MONUMENTS.

15. In case your survey is situated in a district where there are no corners of the public survey and no monuments within the prescribed limits, you will proceed to establish a mineral monument, in the location of which you will exercise the greatest care to insure permanency as to site and construction.

The site, when practicable, should be some prominent point, visible for a long distance from every direction, and should be chosen that the permanency of the monument will not be endangered by snow, rock, or land slides, or other natural causes.

16. The location monument should consist of a stone not less than thirty inches long, twenty inches wide, and six inches thick, set halfway in the ground, with a conical mound of stone four feet high and six feet base alongside. The letters U. S. L. M., followed by the consecutive number of the monument in the district, must be plainly chiseled upon the stone. If impracticable to obtain a stone of required dimensions, then a post eight feet long, six inches square, set three feet in the ground, scribed as for a stone monument, protected by a well-built conical mound of stone of not less than three feet high and six feet base around it, may be used. The exact point for connection must be indicated on the monument by a × chiseled thereon; if a post is used, then a tack must be driven into the post to indicate the point.

17. From the monument, connections by course and distance must be taken to two or three bearing trees or rocks, and to any well-known and permanent objects in the vicinity, such as the confluence of streams, prominent rocks, buildings, shafts or mouths of adits. Bearing trees must be properly scribed B. T. and bearing rocks chiseled B. R., together with the number of the location monument; the exact point on the tree or stone to which the connection is taken should be indicated by a cross or other unmistakable mark. Bearings should also be taken to prominent mountain peaks, and the approximate distance and direction ascertained from the nearest town or mining camp. A detailed description of the locating monument, with a topographical map of its location, should be furnished this office.

CORNERS.

18. Corners may consist of—

First—A stone at least 24 inches long set 12 inches in the ground, with a conical mound of stone 1½ feet high, 2 feet base, alongside, and state kind of stone set for corner. A stone should always be used for a corner when possible.

Second—A post at least 3 feet long by 4 inches square, set 18 inches in the ground and surrounded by a substantial mound of stone or earth.

Third—A rock in place.

19. All corners must be established in a permanent and workmanlike manner, and the corner and survey number must be neatly chiseled or scribed on the sides facing the claim. The *exact* corner point must be permanently indicated on the corner. When a rock in place is used its dimensions above ground must be stated, and a cross chiseled at the exact corner point.

20. In case the point for the corner be inaccessible or unsuitable, you will establish a

witness corner, which must be marked with the letters W. C. in addition to the corner and survey number. The witness corner should be located upon a line of the survey and as near as possible to the true corner with which it must be connected by course and distance. The reason why it is impossible or impracticable to establish the true corner must always be stated in the field notes, and in running your next course state whether you start from the true place for corner or from witness corner.

21. The identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, and other objects, as prescribed in the establishment of location monuments, and when no bearings are given, state "no bearings available." Permanent objects should be taken whenever possible.

22. If an official survey has been made within a reasonable distance in the vicinity, you will run a connecting line to some corner of the same, and connect in like manner with all conflicting surveys and claims, and describe corner with which connection is made.

23. In survey of contiguous locations which are part of a consolidated claim, where corners are common, mention bearings but once, but where a corner is common to different claims, the required number of bearings will be taken from each claim.

TOPOGRAPHY.

24. Note carefully all topographical features of the claim, taking distances on your lines to intersections with all streams, gulches, ditches, ravines, mountain ridges, roads, trails, etc., with their widths, courses, and other data that may be required to map them correctly. If the claim lies within a town site, locate all municipal improvements, such as blocks, streets, and buildings.

CONFLICTS.

25. If, in running the exterior boundaries of a claim, you find that two surveys conflict, you will determine the courses and distances from the established corners thereof, *situate within the boundaries of your survey*, at which the exterior boundaries intersect each other, and run all lines necessary for the determination of the areas in conflict, both with surveyed and unsurveyed claims. You will not, however, show conflicts with unsurveyed claims unless the same are to be excluded.

26. Your attention is directed to paragraphs 50 and 51 of General Land Office circular, dated December 10, 1891, as amended by circular of November 7, 1895:

"50. The rights granted to locators under section 2322, Revised Statutes, are restricted to such locations on veins, lodes, or ledges as may be 'situated on the *public domain*.' In applications for lode claims where the survey conflicts with a prior valid lode claim, and the ground in conflict is excluded, the applicant not only has no right to the excluded ground, but he has no right to that portion of any vein or lode, the top or apex of which lies within such excluded ground, unless his location was prior to May 10, 1872. His right to the lode claimed terminates where the lode, in its onward course or strike, intersects the exterior boundary of such excluded ground and passes within it. The end line of his survey should not, therefore, be established beyond such intersection.

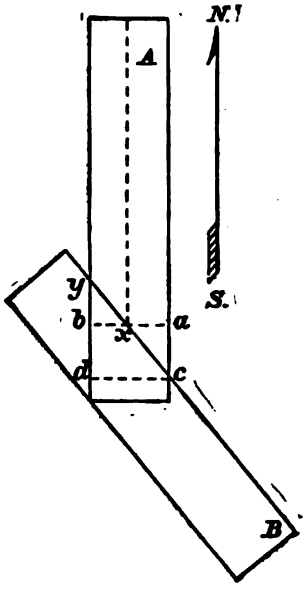
"51. Where, however, the lode claim for which survey is being made, was located prior to the conflicting claim, and such conflict is to be excluded, in order to include all ground not so excluded the end line of the survey may be established within the conflicting lode claim, but the line must be so run as not to extend any further into such conflicting claim than may be necessary to make such end line parallel to the other end line, and at the same time embrace the ground so held and claimed. The useless practice in such cases of extending *both* the side lines of a survey into the conflicting claim, and establishing an end line wholly within it, beyond a point necessary under the rule just stated, will be discontinued."

Explanation.

Location "A" in the diagram represents a location for which survey is applied for. As a location it conflicts with location "B," and the claimant of "A" lays no claim to the conflicting area. In accordance with the definition of locators' rights under section 2322, U. S. R. S., as given in paragraph 50 of said circular of Dec. 10, 1891, if location "B" was a valid and subsisting location at the time location "A" was made, the locator of "A" has no right to extend the survey of his claim beyond the point where his lode in its onward course intersects the location "B," and in such case the end lines of the survey should be run through such point of intersection, as represented by lines "a" "b" on diagram.

If it is more desirable, however, the south end line may be the side line of "B" within the side lines of "A" as represented by "c" "y," with which the north end line must be made parallel.

This circular applies also to contiguous locations belonging to one owner and surveyed as a single claim.



If, on the contrary, when location "A" was made the location "B" was not existent, and there was no other conflict, the abandonment of the conflict with the latter location, "B," brings the case within paragraph 51 of said circular.

To illustrate: "A" is the first and valid location, afterward the "B" location is made, and for reasons satisfactory to "A" the ground in conflict is relinquished to "B," yet the claimant of "A" claims all the land outside of the conflict included in his location.

The end line contemplated by the circular to include all ground claimed as aforesaid, should be run as represented by the line "c" "d," the rest of the lines of conflict being eliminated entirely. The survey must in this case stop at the line "c" "d."

27. It will be particularly observed by you that the above provisions of General Land Office circular dated December 10, 1891, are just as applicable in the case of conflicting and overlapping locations embraced in one survey as though the several locations were embraced in separate and distinct surveys.

28. A lode claim that is divided into two parts by an intersecting patented mill site, placer, or agricultural entry, must be confined to that part which contains the discovery shaft and improvements. (13 L. D. 146.)

29. The exterior lines of placer claims or mill sites cannot be extended over other claims, and the conflicting areas excluded, as with lode claims, it being the surface ground only, with side lines taken perpendicularly downward, for which application is made. The survey must accurately define the boundaries of the *claim*.

30. If, by reason of intervening surveys or claims, a placer survey should be divided into separate tracts, you will preserve a separate series of numbers for the corners of each location, and a consecutive series of numbers for the corners of the tracts embraced in each; distinguishing the detached portions as Tract A, Tract B, etc., connecting by course and distance a corner of each tract with some corner of one previously described. The provisions of this paragraph will also apply to the surveys of mill sites.

LODE AND MILL SITE.

31. A lode and mill site claim in one survey will be distinguished by the letters A and B following the number of the survey. The corners of the mill site will be numbered independently of those of the lode. Corner No. 1 of the mill site must be connected with a corner of the lode claim as well as with a corner of the public survey or United States location monument.

FIELD NOTES.

32. In order that the results of your survey may be reported in a uniform manner, you will prepare your field notes and preliminary plat in strict conformity with the specimen field notes and plats, which are made part of these instructions. They are designed to furnish you all the needed information concerning the manner of describing the boundaries, corners, connections, intersections, conflicts, and improvements, and stating the variation, area, location, and other data connected with the survey of mineral claims, and contain forms of affidavits for the deputy surveyor and his assistants.*

33. When a placer claim includes lodes, or when several contiguous placer or lode locations are included as one claim in one survey,

* In a letter dated September 12, 1896, to the United States Surveyor General for Utah, the Commissioner of the General Land Office held that the specimen field-notes and plat forming part of the Manual of Surveying were intended to be merely *illustrative* of the various paragraphs of the instructions, and that the latter should control.

you will give to the corners of each location constituting the same a separate consecutive numerical designation, begining with Corner No. 1 in each case. In the former case you will first describe the placer claim in your field notes.

34. Throughout the description of the survey, after each reference to the lines or corners of a location, give the name thereof, and if unsurveyed state the fact. If reference is made to a location included in a prior official survey, the survey number must be given, followed by the name of the location. Describe your corners once only.

35. The total area of each location in a claim embraced by its exterior boundaries, and also the area in conflict with each intersecting survey or claim should be stated. Also the total area claimed. But when locations of the survey conflict with each other, such conflicts should only be stated in connection with the location from which the conflicting area is excluded.

36. You will state particularly whether the claim is upon surveyed or unsurveyed public lands, giving in the former case the quarter section, township and range in which it is located, and in the latter, the township, as near as can be determined. When upon surveyed lands the section lines should be indicated by full lines and the quarter-section lines by dotted lines.

37. The title page must contain the post-office address of the claimant or his authorized agent.

EXPENDITURE OF FIVE HUNDRED DOLLARS.

38. In making out your certificate of the value of the improvements, you will follow the form prescribed in the specimen field notes.

39. Only *actual* expenditures and *mining* improvements made by the claimant or his grantors, having a direct relation to the development of the claim, can be included in your estimate. "Labor or improvements within the meaning of the statute are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain." (6 L. D. 222.)

40. The expenditures required may be made from the surface or in running a tunnel, drifts, or cross-cuts, for the development of the claim. Improvements of any other character, such as buildings, machinery, or roadways, must be excluded from your estimate, unless you show clearly that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., and are essential to the practical development of the surveyed claim.

41. You will locate all mining and other improvements upon the claim by courses and distances from corners of the survey, or from points on the center or side lines, specifying with particularity and detail the dimensions and character of each, and the improvements upon each location should be numbered consecutively, the point of discovery being always No. 1.

42. You will give in detail the value of each mining improvement included in your estimate of expenditure, and when a tunnel or other improvement has been made for the development of other claims in connection with the one for which survey is made, you must give the name, ownership, and survey number, if any, of each claim to which a portion or interest is credited, and the value of the portion or interest credited to the claim. The value of improvements made upon other locations, or by a former locator who has abandoned his claim, cannot be included in your estimate, but should be described and located in your notes and plat.

43. In case of a lode and mill site claim in the same survey, an expenditure of $500 must be shown upon the lode claim only.

44. When a survey embraces several locations held in common constituting one entire claim, whether lode or placer, an expenditure of five hundred dollars upon such entire claim embraced in the survey will be sufficient, but in preparing your estimate of five hundred dollars expenditure thereon you will observe the requirements of the decision of the Commissioner of the General Land Office, dated June 11, 1890, quoted below for your information:

"When two or more lode locations are embraced in one entry, and the improvements on each lode are not of the value of $500, it must be shown that a sum equal in value, of labor or improvements, has been expended for the common benefit of all those of which the improvements do not equal that sum, with a satisfactory explanation of how and in what manner such improvements tend to a common benefit." (See also 20 L. D. 394.)

The explanatory statement in such cases should be given in your field notes, or affidavit, at the conclusion of the description of the improvements included in the estimate of expenditure, and should be as full and explicit as the facts in the case warrant, dealing only with the improvements, conditions, and circumstances, as they actually existed at the time of making the survey or examination, without reference to what is possible or what the claimants may intend to do.

45. Following your certificate you will locate and describe all other improvements made by the claimant within the boundaries of the survey. Those made by other parties, if any, whose names should be mentioned, will be given in a separate description, following those of the claimants.

46. If the value of the labor and improvements upon a mineral claim is less than five hundred dollars at the time of survey, you are authorized to file your affidavit of five hundred dollars expenditure at any time. If the affidavit is made subsequent to the period of publication, it should be shown, if practicable, when the improvements were made. The information on which to base this affidavit must be derived by the deputy who makes the actual survey from a careful examination upon the premises.

PRELIMINARY PLAT.

47. You will file with your field notes a preliminary plat on blank sent you for that purpose, protracted on a scale of two hundred feet to an inch, if practicable, in conformity with the specimen plat herewith. In preparing plats make the top north. Copy of your calculations of areas by double meridian distances and of all triangulations or traverse lines, must also be furnished. The lines of the claim surveyed, on this plat and on all plats of *approved* surveys, should be heavier and show a contrast with conflicting claims.

ERRORS.

48. You will also mention in your notes the discovery of any material errors in prior official surveys, stating explicitly what lines are found to be in error, and giving in express terms the courses and lengths thereof as determined by you.

49. Whenever a survey has been reported in error, the deputy surveyor who made it will be required to promptly make a thorough examination, upon the premises, and report the result, under oath, to the Surveyor General's office. In case he finds his survey in error, he will report in detail all discrepancies with the original survey, and submit any explanation he may have to offer as to the cause. If, on the contrary, he should report his survey correct, a joint survey will be ordered to settle the differences with the surveyor who reported the error.

JOINT SURVEY.

50. A joint survey must be made within ten days after the date of order, unless satisfactory reasons are submitted, under oath, for a postponement.

51. The field work must in every sense of the term be a *joint* and not a separate survey, and the observations and measurements taken with the same instrument and chain, previously tested and agreed upon.

52. The deputy surveyor found in error, or if both are in error, the one who reported the same, will make out the field notes of the joint survey, which, after being duly signed and sworn to by both parties, must be transmitted to the Surveyor General's office. The surveyor found in error will be required to pay all expenses of the joint survey and ten dollars per day to the surveyor whose work is found to be substantially correct, and either deputy shall have the right to require the other to deposit the estimated amount of this expense with the Surveyor General before the joint work is begun.

AMENDED SURVEYS.

53. Inasmuch as amended surveys are ordered only by special instructions from the General Land Office, and the conditions and circumstances peculiar to each separate case, and the object sought by the required amendment, alone govern all special matters relative to the manner of making such survey and the form and subject-matter to be embraced in the field notes thereof, but few general rules applicable to all cases can be laid down.

54. The amended survey must be made in strict conformity with, or be embraced within, the lines of the original survey. If the amended and original surveys are identical, that fact must be clearly and distinctly stated in your field notes. If not identical, a bearing and distance must be given from each established corner of the amended survey to the corresponding corner of the original sur-

vey. The lines of the original survey, as found upon the ground, must be laid down upon the preliminary plat in such manner as to contrast and show their relation to the lines of the amended survey.

55. The field notes of the amended survey must be prepared on the same size and form of blanks as are the field notes of the original survey, and the word "amended" must be used before the word "survey" wherever it occurs in the field notes.

DESCRIPTIVE REPORTS ON PLACER CLAIMS.

56. By General Land Office circular approved December 10, 1891, par. 63 *(see Appendix B hereof), you are required to make a full examination of all placer claims at the time of survey, and file with your field notes a descriptive report, in which you will describe:

(*a*) The quality and composition of the soil, and the kind and amount of timber, and other vegetation.

(*b*) The *locus* and size of streams, and such other matter as may appear upon the surface of the claims.

(*c*) The character and extent of all surface and underground workings, whether placer or lode, for mining purposes, locating and describing them, as required by section 41.

(*d*) The proximity of centers of trade or residence.

(*e*) The proximity of well-known systems of lode deposits or of individual lodes.

(*f*) The use or adaptability of the claim for placer mining, and whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose.

(*g*) What works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(*h*) The true situation of all mines, salt licks, salt springs, and mill sites, which come to your knowledge, or report that none exist on the claim, as the facts may warrant.

(*i*) Said report must be made under oath, and duly corroborated by one or more disinterested persons.

67. Descriptive reports on placer claims taken by legal subdivisions are authorized only by special order, and must contain a description of the claim in addition to the foregoing requirements.

PRACTICE.

58. The practice of employing the claimants, their attorneys, or parties in interest, as assistants in making surveys of mineral claims, will not be allowed.

59. Your field work must be accurately and properly performed and your returns made in conformity with the foregoing instructions. Errors in the survey must be corrected at your own expense, and if the time required in the examination of your returns is increased by reason of your neglect or carelessness, you will be required to make an additional deposit for office work. You will be held to a strict accountability for the faithful discharge of your duties, and will be required to observe fully the requirements and regulations in force as to making mineral surveys. If found incompetent as a surveyor, careless in the discharge of your duties, or guilty of a violation of said regulations, your appointment will be promptly revoked.

(4—689.)

APPLICATION TO UNITED STATES SURVEYOR GENERAL FOR SURVEY OF MINING CLAIM.

DENVER, COLO., January 25, 1898.

UNITED STATES SURVEYOR GENERAL,
Denver, Colorado.

SIR: T. E. Jenkins *et al.*, claimants, hereby make application for an official survey, under the provisions of Chapter Six, Title Thirty-two, of the Revised Statutes of the United States, and regulations and instructions thereunder, of the mining claim known as the Cumro Placer and Poorman, Hawley, Ætna, and Podunk lodes and the Poorman mill site, situate in Pike's Peak Mining District, El Paso County, Colorado, in Sections 17, 19, and 20, Township No. 14 S., Range No. 69 W. Said claim is based upon valid locations made on various dates, 18.., and duly recorded on various dates, 18.., and is fully described in the duly certified copies of the record of the location certificates filed herewith. Said certificates contain the name of the locators, the dates of location, and such a definite description of the claim by reference to natural objects or permanent monuments as will identify the claim, and said locations have been distinctly marked by monuments on the ground, so that their boundaries can be readily traced.

I request that you will send me an estimate of the amount required to defray the expenses of platting and other work in your office, required under the regulations, that I may make proper deposit therefor, and that thereupon you will cause the survey to be made by A. L. Hawley, United States deputy

* Page 332.

mineral surveyor, and proper action to be taken thereon by your office, as required by the United States mining laws and regulations thereunder. T. E. JENKINS,
For himself and co-claimants.
P. O. address: Denver,
Arapahoe County, Colorado.

(4—682.)

ORDER FOR MINERAL SURVEY.

DEPARTMENT OF THE INTERIOR,
OFFICE OF U. S. SURVEYOR GENERAL,
DENVER, COLO., February 6, 1893.

To A. L. HAWLEY,
U. S. Deputy Mineral Surveyor,
Denver, Colorado.

SIR:

Application has been filed in this office by T. E. Jenkins *et al.*, dated January 25, 1893, for an official survey of the mining claim of T. E. Jenkins *et al.*, known as the Cumro Placer and Poorman, Hawley, Ætna, and Podunk lodes and Poorman mill site, situate in Pike's Peak Mining District, El Paso County, in Sections 17, 19, and 20, Township No. 14 S., Range No. 69 W., which claim is based upon locations made on May 1, 1892, May 4, 1892, May 4, 1888, June 4, 1892, June 14, 1891, and December 5, 1891, respectively, and duly recorded various dates, 18.., and is fully described in the duly certified copies of the record of the location certificates filed by the applicants for said survey, copies of which are herewith inclosed. You are hereby directed to make the survey of said claim in strict conformity with existing laws, official regulations, and instructions thereunder, and to make proper return to this office. Said survey will be designated as Survey No. 8000, A and B.

Very respectfully,
....., ...,
U. S. Surveyor General for Colorado.

SPECIMEN FIELD-NOTES.

(4—683.)

Mineral Survey No....8000, A and B..
Lot No. ....
.....Pueblo.. ...Land District.

FIELD NOTES

OF THE SURVEY OF THE MINING CLAIM OF

.....T. E. Jenkins *et al.*,.....

KNOWN AS THE

.... Cumro Placer and Poorman, Hawley, Ætna, and Podunk Lodes,
.....and Poorman Mill Site.....
.....Pike's Peak.....Mining District,
.....El Paso.....County.....Colorado.....
Sections..17, 19, and 20, ...Township.....
14 S., ... Range .. 69 W ...

Surveyed under instructions dated .....
February 6, 1893,....
by.....A. L. HAWLEY,.....
U. S. Deputy Mineral Surveyor.
Claim located ....., 18...
Survey commenced....February 9, 1893..
Survey completed....February 12, 1893..
Address of claimants:
.....Denver, ...
.....Colorado.... .....

FEET.	SURVEY 8000 A.
	CUMRO PLACER.
	TRACT A.
	Beginning at Cor. No. 1.
	Identical with the SW. Cor. of the location and with the SW. Cor. of sec. 17, T. 14 S., R. 69 W. of the 6th Principal Meridian.
	A pine post, 4½ ft. long, 4 ins. square, set 2 ft. in the ground, with mound of stone, alongside the section corner, scribed 1–8000 A, whence
	A spruce, 17 ins. diam., bears N. 8° 41′ W. 7 ft., and a spruce, 14 ins. diam., bears S. 68° 14′, E. 18.5 ft., each blazed and scribed B. T. 1–8000 A.
	James Peak bears N. 52° 21′ W.
	Hahns Peak bears N. 29° 28′ W.
	Thence North.
	Va. 14° 23′ E.
660.	To Cor. No. 2.
	Identical with a corner of the location.
	A pine post, 4½ ft. long, 4 ins. square, set 18 ins. in the ground, with mound of earth and stone, scribed 2–8000 A, whence
	A spruce, 18 ins. diam., blazed and scribed B. T. 2–8000 A, bears S. 14° 47′, E. 17.3 ft.
	Thence N. 89° 50′ E.
	Va. 14° 28′ E.
182.3	To Cor. No. 3.
	On line 1–2 Hawley lode of this survey.
	A cedar post, 5 ft. long, 4 ins. square, set 2 ft. in the ground, with mound of earth, scribed 3–8000 A, whence
	A corner of the location bears N. 89° 50′ E, 1126.7 ft.
	Thence S. 8° 48′ E.
	Va. 14° 28′ E.
84.5	To Cor. No. 4.
	A pine post, 4½ ft. long, 4 ins. square, set 2 ft. in the ground, with mound of stone, scribed 4–1–8000 A, whence
	A pine, 14 ins. diam., bears S. 21° 47′ E. 14.3 ft., and a spruce, 11 ins. diam., bears N. 14° 52′ E. 6 ft., each blazed and scribed B. T. 4–1–8000 A.

Feet.	
	Thence N. 86° 12′ E. Va. 14° 28′ E.
67.2	To Cor. No. 5. On line 1–2 Poorman lode of this survey. A cottonwood post, 5 ft. long, 4 ins. square, set 2 ft. in the ground, with mound of stone, scribed 5–8000 A.
	Thence S. 17° 38′ W. Va. 14° 36′ E.
243.4	To Cor. No. 6. A pine post, 4½ ft. long, 4 ins. square, set 2 ft. in the ground, with mound of earth, scribed 6–1–8000 A, whence A high Mt. bears N. 51° 14′ E.
	Thence S. 41° 14′ E. Va. 14° 30′ E.
350.48	To Cor. No. 7. A granite bowlder, 27 x 12 x 9 ins., set 16 ins. in the ground, chiseled 7–6–8000 A.
	Thence N. 17° 38′ E. Va. 14° 30′ E.
543.88	To Cor. No. 8. On line 4–1 Hawley lode of this survey. A pine post, 4½ ft. long, 5 ins. square, set 2 ft. in the ground, scribed 8–8000 A.
	Thence N. 86° 12′ E. Va. 14° 28′ E.
416.8	To Cor. No. 9. On line 3–4 Podunk lode of this survey. A granite stone, 26 x 16 x 6 ins., set 18 ins. in the ground, with mound of stone, chiseled 9–8000 A.
	Thence S. 41° 14′ E. Va. 14° 28′ E.
555.44	To Cor. No. 10. On line 4–1 Sur. No. 7000, Ajax lode, claimant unknown. A pine post, 4½ ft. long, 4 ins. square, set 18 ins. in the ground, with mound of earth, scribed 10–8000 A.
	Thence S. 7° 45′ W. Va. 14° 25′ E.
210.	To Cor. No. 11. On line 4–1 Sur. No. 7000, Ajax lode, at N. 75° 45′ E., 10.73 ft. from Cor. No. 4. A pine post, 5 ft. long, 4 ins. square, set 2 ft. in the ground, with mound of earth and stone, scribed 11–8000 A, whence A cottonwood post, 8 ins. diam., blazed and scribed B. T. 11–8000 A, bears N. 33° 27′ W. 5 ft.
	Thence S. 89° 50′ W. Va. 14° 25′ E.
1329.42	To Cor. No. 1, the place of beginning.

Feet.	TRACT B.
	Beginning at Cor. No. 12. At intersection of lines 3–4, Ætna lode of this survey, and Aztec lode, unsurveyed, John Doe, claimant. A spruce post, 4½ ft. long, 4 ins. square, set 18 ins. in the ground, scribed 12–8000 A, whence A pine stump, 18 ins. diam., 3 feet high, blazed and scribed B. S. 12–8000 A. bears N. 89° 11′ E. 9.4 ft.
	Thence S. 41° 14′ E. Va. 14° 30′ E.
397.33	To Cor. No. 13. A sandstone, 36 x 20 x 4 ins., set 16 ins. in the ground with mound of stone, chiseled 13–3–8000 A.
	Thence S. 48° 46′ W. Va. 14° 30′ E.
300.	Cor. Nos. 2, Ætna and Podunk lodes of this survey, a point in Cumro Creek, 4 ft. wide, flows west.
330.7	To Cor. No. 14. A rock in place 6 x 4 x 2 ft. above the general surface, chiseled cross (×) at corner point and 14–W. C. 2–2–8000 A, whence Cor. No. 11, Tract A, of this survey, bears S. 89° 50′ W. 539 ft.
	Thence N. 89° 50′ E. Va. 14° 30′ E.
769.6	To Cor. No. 15. Identical with the S. ¼ Cor. of said Sec. 17, and with the SE. Cor. of the location. A granite stone, 12 x 10 x 6 ins. above the ground, chiseled, 15–8000 A.
	Thence North. Va. 14° 30′ E.
265.	Cumro Creek, 4 ft. wide, flows S. 65° W.
758.1	To Cor. No. 16. On line 3–4, Aztec lode, unsurveyed, at S. 72° 43′ W. 115.6 ft. from Cor. No. 3. A spruce post, 4½ ft. long, 4 ins. square, set 6 ins. in the ground to bed rock, with mound of earth and stone, scribed 16–8000 A.
	Thence S. 72° 43′ W. Va. 14° 28′ E.
819.1	To Cor. No. 12, the place of beginning.
	TRACT C.
	Beginning at Cor. No. 17. On line 1–2, Aztec lode, unsurveyed, at S. 72° 43′ W. 22.26 ft. from Cor. No. 2. A pine post, 4½ ft. long, 4 ins. square, set 12 ins. in the ground to bed rock,

Feet.	
	with mound of stone, scribed 17–8000 A, whence
	Cor. No. 16, Tract B, of this survey, bears South 314.2 ft.
	Thence S. 72° 43′ W. Va. 14° 40′ E.
938.26	To Cor. No. 18.
	At intersection of lines 1–2 and 2–3, Aztec lode, unsurveyed, and Sur. No. 7000, Ajax lode, respectively.
	A cross (×) at corner point and 18–8000 A chiseled on a granite rock in place, showing 10 x 3 x 2 ft. above the general surface.
	Thence N. 7° 45′ E. Va. 14° 30′ E.
530.	To Cor. No. 19.
	On line 2–3, Sur. No. 7000, Ajax lode, at S. 7° 45′ W. 116.4 ft. from Cor. No. 2.
	A granite stone, 28 x 10 x 3 ins., set 12 ins. in the ground, chiseled 19–8005 A, whence
	A corner of the location bears S. 89° 50′ W. 484.6 ft.
	Thence N. 89° 50′ E. Va. 14° 30′ E.
624.43	To Cor. No. 20.
	A granite rock, 30 x 20 x 16 ins., set 16 ins. in the ground, chiseled 20–8000 A, whence
	A cross (×) and B. R. 20–8000 A, chiseled 4 ft. above the ground on a limestone cliff 20 ft. high, bears S. 83° 11′ E. 45.6 ft.
	Thence South. Va. 14° 30′ E.
247.72	To Cor. No. 17, the place of beginning.

AREA.

Tract A, containing.....	14.660	acres.
Tract B, containing.....	9.858	"
Tract C, containing.....	7.532	"
Total area Cumro placer	32.070	acres.

POORMAN LODE.

Feet.	
	Beginning at Cor. No. 1.
	Identical with Cor. No. 6 Cumro placer of this survey, whence
	The SW. Cor. Sec. 17, T. 14 S., R. 69 W. of the 6th P. M., bears S. 27° 28′ W. 393.26 ft.
	Thence N. 17° 38′ E.
243.4	Cor. No. 5 Cumro placer and intersect line 4–1 Hawley lode, both of this survey.
565.7	Intersect line 2–3 Hawley lode of this survey.
831.4	To Cor. No. 2.
	A granite stone, 27 x 11 x 9 ins., set 12 ins. in the ground, chiseled 2–8000 A.
	Thence N. 48° 46′ E.
661.57	To Cor. No. 3.
	A pine post, 5 ft. long, 4 ins. square, set 22 ins. in the ground, to bed rock, scribed 3–8000 A.
	Thence S. 41° 14′ E.
300.	To Cor. No. 4.
	A cedar post, 4½ ft. long, 5 ins. square, set 18 ins. in the ground, scribed 4–4–8000 A, whence
	Cor. No. 1 Sur. No. 7000, Ajax lode, bears N. 72° 22′ E. 422.6 ft.
	Thence S. 48° 46′ W.
300.	Cor. Nos. 1 Ætna and Podunk lodes of this survey.
578.	To Cor. No. 5.
	A cedar stump, 3 ft. high, hewed to 4 ins. square, surrounded by mound of stone, scribed 5–4–8000 A, whence
	A cross (×) and B. R. 5–4–8000 chiseled on a porphyry stone, showing 9 x 6 x 4 feet above the ground, bears N. 75° 14′ E. 32.7 feet.
	Thence S. 17° 38′ W.
64.4	Intersect line 2–3 Hawley lode of this survey.
386.7	Cor. No. 8 Cumro placer and intersect line 4–1 Hawley lode, both of this survey.
929.04	To Cor. No. 6.
	Identical with Cor. No. 7 Cumro placer of this survey.
	Thence N. 41° 14′ W.
350.48	To Cor. No. 1, the place of beginning.

HAWLEY LODE.

Feet.	
	Beginning at Cor. No. 1.
	Identical with Cor. No. 1 of the location and with Cor. No. 4 Cumro placer of this survey, whence
	The SW. Cor. Sec. 17, T. 14 S., R. 69 W. of the 6th P. M. bears S. 18° 4′ W. 606.1 ft.
	Cor. No. 1 Poorman lode of this survey bears S. 1° 41′ W. 227.6 ft.
	Thence N. 3° 48′ W. Va. 14° 28′ E.
84.5	Cor. No. 3 Cumro placer of this survey.
800.	To Cor. No. 2.
	A sandstone, 30 x 12 x 2 ins., set 14 ins. in the ground, chiseled 2–8000 A, whence
	Cor. No. 4 of the location bears N. 45° W. 28.5 ft.
	Thence N. 86° 12′ E. Va. 14° 25′ E.
185.	Intersect line 1–2 Poorman lode of this survey.
507.3	Intersect line 5–6 Poorman lode of this survey.

Feet.	
567.6	Intersect line 3–4 Podunk lode of this survey.
926.7	Intersect lines 1–2 Podunk and Ætna lodes of this survey.
1264.7	To Cor. No. 8. A granite stone, 26 x 14 x 8 ins., set 12 ins. in the ground with mound of stone, chiseled 3–8000 A, whence Cor. No. 3 of the location bears N. 86° 12′ E. 235.3 ft. Cor. No. 1 Sur. No. 7000, Ajax lode, bears N. 11° E. 529.9 ft. Cor. No. 1 Aztec lode, unsurveyed, bears S. 32° 30′ W. 378.4 ft.
	Thence S. 3° 48′ E. Va. 14° 26′ E.
150.	Intersect line 4–1 Sur. No. 7000, Ajax lode, at S. 7° 45′ W. 676 ft. from Cor. No. 1.
250.6	Intersect line 1–2 Aztec lode, unsurveyed, at N. 72° 43′ E. 229.8 ft. from Cor. No. 1.
300.	To Cor. No. 4. A pine post, 4½ ft. long, 4 ins. square, set 18 ins. in the ground, scribed 4–8000 A, whence Cor. No. 4 of the location bears N. 86° 12′ E. 235.3 ft.
	Thence S. 86° 12′ W. Va. 14° 15′ E.
39.8	Intersect line 4–1 Sur. No. 7000, Ajax lode, at S. 7° 45′ W. 829.1 ft. from Cor. No. 1.
108.3	Intersect lines 1–2 Ætna and Podunk lodes of this survey.
206.	Intersect line 1–2 Aztec lode, unsurveyed, at N. 72° 43′ E. 18.1 ft. from Cor. No. 1.
458.4	Cor. No. 9 Cumro placer and intersect line 3–4 Podunk lode, both of this survey.
875.2	Cor. No. 8 Cumro placer and intersect line 5–6 Poorman lode, both of this survey.
1197.5	Cor. No. 5 Cumro placer and intersect line 1–2 Poorman lode, both of this survey.
1264.7	To Cor. No. 1, the place of beginning.

Ætna Lode.

Beginning at Cor. No. 1.
On line 4–5 Poorman lode of this survey.
A pine post, 4½ feet long, 4 ins. square, set 18 ins. in the ground, scribed 1–1–8000 A, whence
TheSW. Cor. Sec. 17, T. 14 S., R. 69 W. of the 6th P. M., bears S. 38° 2′ W. 1465 ft.
Cor. No. 1 Aztec lode, unsurveyed, bears S. 32° 19′ E. 607.76 ft.
Cor. No. 3 Hawley lode of this survey, bears S. 69° 46′ E. 561.9 ft.

Feet.	
	Thence S. 41° 14′ E.
288.3	Intersect line 2–3 Hawley lode of this survey.
641.2	Intersect line 1–2 Aztec lode, unsurveyed, at N. 72° 43′ E. 103.1 ft. from Cor. No. 1.
666.1	Intersect line 4–1 Hawley lode of this survey.
766.9	Intersect line 4–1 Sur. No. 7000, Ajax lode, at S. 7° 45′ W. 910.9 ft. from Cor. No. 1.
969.5	Intersect line 3–4 Aztec lode, unsurveyed, at N. 72° 43′ E. 236.3 ft. from Cor. No. 4.
1164.7	Intersect line 2–3 Sur. No. 7000, Ajax lode, at N. 7° 45′ E. 328.2 ft. from Cor. No. 3.
1500.	To Cor. No. 2. On line 13–14 Cumro placer of this survey. Not set, as it falls in the center of Cumro Creek, where permanent corner could not be established, whence Witness corner to Cor. No. 2, identical with Cor. No. 14 Cumro placer of this survey, bears S. 48° 46′ W. 30.7 ft. Cor. No. 3 Sur. No. 7000, Ajax lode, bears S. 74° 38′ W. 275.2 ft.
	Thence N. 48° 46′ E.
300.	To Cor. No. 3. Identical with Cor. No. 13 Cumro placer of this survey.
	Thence N. 41° 14′ W.
397.83	Cor. No. 12 Cumro placer of this survey and intersect line 3–4 Aztec lode, unsurveyed, at N. 72° 43′ E. 564.6 ft. from Cor. No. 4.
596.43	Intersect line 2–3 Sur. No. 7000, Ajax lode, at N. 7° 45′ E. 725.8 ft. from Cor. No. 3.
725.6	Intersect line 1–2 Aztec lode, unsurveyed, at N. 72° 43′ E. 431.3 ft. from Cor. No. 1.
994.	Intersect line 4–1 Sur. No. 7000, Ajax lode, at S. 7° 45′ W. 518.2 ft. from Cor. No. 1.
1500.	To Cor. No. 4. Identical with Cor. No. 4 Poorman lode of this survey.
	Thence S. 48° 46′ W.
300.	To Cor. No. 1, the place of beginning.

Podunk Lode.

Beginning at Cor. No. 1.
Identical with Cor. No. 1 Ætna lode of this survey, whence
Cor. No. 2 of the location bears N. 48° 46′ E. 22 ft.
The SW. Cor. Sec. 17, T. 14 S., R. 69 W. of the 6th P. M., bears S. 38° 2′ W. 1465 ft.

Feet.	
	Thence S. 41° 14′ E.
288.3	Intersect line 2–3 Hawley lode of this survey.
641.2	Intersect line 1–2 Aztec lode, unsurveyed, at N. 72° 43′ E. 103.1 ft. from Cor. No. 1.
666.1	Intersect line 4–1 Hawley lode of this survey.
766.9	Intersect line 4–1 Sur. No. 7000, Ajax lode, at S. 7° 45′ W. 910.9 ft. from Cor. No. 1.
969.5	Intersect line 3–4 Aztec lode, unsurveyed, at N. 72° 43′ E. 236.3 ft. from Cor. No. 4.
1164.7	Intersect line 2–3 Sur. No. 7,000, Ajax lode, at N. 7° 45′ E. 328.2 ft. from Cor. No. 3.
1500.	To Cor. No. 2. In Cumro creek. Identical with Cor. No. 2 Ætna lode of this survey, whence Cor. No. 3 of the location bears N. 48° 46′ E. 22 ft.
	Thence S. 48° 46′ W.
30.7	Witness corner to Cor. No. 2. Identical with witness corner to Cor. No. 2 Ætna lode, and with Cor. No. 14 Cumro placer, both of this survey.
250.	Witness corner to Cor. No. 3. A granite stone, 30 x 20 x 4 ins., set 14 ins. in the ground, with mound of stone, chiseled W. C. 3–8000 A, whence A cedar stump, 14 ins. diam., 2 ft. high, blazed and scribed B. S. W. C. 3–8000 A., bears N. 7° 56′ W. 8.4 ft. Pike's Peak bears N. 5° E.
278.	To Cor. No. 3. On face of inaccessible granite cliff. Identical with Cor. 4 of the location.
	Thence N. 41° 14′ W.
37.	Cumro creek, 4 ft. wide, course S. 80° W.
155.	Intersect line 3–4 Sur. No. 7000, Ajax lode, at N. 82° 15′ W. 46.3 ft. from Cor. No. 3.
491.3	Cor. No. 10 Cumro placer of this survey and intersect line 4–1. Sur. No. 7000, Ajax lode, at N. 7° 45′ E. 220.7 ft. from Cor. No. 4.
1046.7	Cor. No. 9 Cumro placer and intersect line 4–1 Hawley lode, both of this survey.
1424.5	Intersect line 2–3 Hawley lode of the survey.
1500.	To Cor. No. 4. Identical with Cor. No. 5 Poorman lode of this survey and with Cor. No. 1 of the location.
	Thence N. 48° 46′ E.
278.	To Cor. No. 1, the place of beginning.

Variation at all corners of the Poorman, Ætna, and Podunk lodes, 14° 30′ E.

AREA.

Total area Hawley lode..... 8.710 acres.
Area in conflict with
Poorman lode of this survey. 2.220 "
Sur. No. 7000, Ajax lode..... .053 "
Aztec lode, unsurveyed..... .117 "
Aztec lode, unsurveyed (exclusive of its conflict with Sur. 7000, Ajax lode)..... .089 "

Total area Hawley lode ..... 8.710 acres.
Less area in conflict with —
Poorman lode of this survey.... 2.220 acres.
Sur. No. 7000, Ajax lode..... .053 " "
Aztec lode, unsurveyed..... .089 " =2.362 "
Net area Hawley lode... . 6.348 acres.

Total area Ætna lode..... 10.331 acres.
Area in conflict with
Hawley lode of this survey.. 1.537 "
Sur. No. 7000, Ajax lode..... 2.738 "
Sur. No. 7000, Ajax lode (exclusive of its conflict with Hawley lode of this survey) 2.685 "
Aztec lode, unsurveyed..... 2.261 "
Aztec lode, unsurveyed (exclusive of its conflict with Hawley lode of this survey) 2.167 "
Aztec lode, unsurveyed (exclusive of its conflict with Sur. No. 7000, Ajax lode).. .484 "
Aztec lode, unsurveyed (exclusive of its conflict with Hawley lode of this survey and Sur. No. 7000, Ajax lode)..... ..... .418 "

Total area Ætna lode . .....10.331 acres.
Less area in conflict with —
Hawley lode of this survey... 1.537 acres.
Sur. No. 7000, Ajax lode..... 2.685 "
Aztec lode, unsurveyed..... .418 " =4.640 "
Net area Ætna lode..... 5.691 acres.

Total area Podunk lode..... 9.573 acres.
Area in conflict with
Hawley lode of this survey.. 2.411 "
Sur. No. 7000, Ajax lode ..... 2.526 "
Aztec lode, unsurveyed ..... 1.169 "
Aztec lode, unsurveyed (exclusive of its conflict with Hawley lode of this survey) 1.147 acres.
Aztec lode, unsurveyed (exclusive of its conflict with Sur. No. 7000, Ajax lode).. .811 acres.
Aztec lode, unsurveyed (exclusive of its conflict with

Hawley lode of this survey and Sur. No. 7000, Ajax lode)		.789 acres.
Total area Podunk lode		9.573 acres.
Less area in conflict with—		
Hawley lode of this survey	2.411 acres.	
Sur. No. 7000, Ajax lode	2.516 "	
Aztec lode, unsurveyed	.789 "	5.716 "
Net area Podunk lode		3.857 acres.
Net area Hawley lode		6.348 "
Net area Ætna lode		5.691 "
Total and net area Poorman lode		10.331 "
Net area lode claim		26.227 acres.

Feet.	SURVEY No. 8000 B.
	POORMAN MILL SITE.
	Beginning at Cor. No. 1.
	A spruce post, 5 ft. long, 4 ins. square, set 18 ins. in the ground, scribed 1–8000 B, whence
	Cor. No. 6, Sur. No. 8000 A, Poorman lode, bears N. 50° 8′ E. 3782 ft.
	The NE. Cor. Sec. 19, T. 14 S., R. 69 W. of the 6th P. M., bears N. 46° 48′ E, 3416.9 ft.
	Thence S 85° 51′ W.
65.	Cumro creek, 4 ft. wide, flows N. 65° W.
858.	Cumro creek, 4 ft. wide, flows South.
921.2	To Cor. No. 2.
	A granite stone, 28 x 12 x 10 ins., set 12 ins. in the ground, with mound of stone, chiseled 2–8000 B, whence
	A pine 12 ins. diam., blazed and scribed B. T. 2–8000 B, bears West 9.5 ft.
	Thence N. 37° 55′ E.
467.66	To Cor. No. 3.
	A granite stone, 30 x 12 x 8 ins., set 18 ins. in the ground, with mound of stone, chiseled 3–8000 B.
	Thence S. 64° 25′ E.
700.	To Cor. No. 1, the place of beginning.
	Containing 3.671 acres.
	Variation at all corners 14° 45′ E.

The surveys of the Poorman and Ætna lodes and the Poorman mill site are identical with the respective locations.

LOCATION.

This claim is located in the SW. ¼ of Sec. 17, the NE. ¼ of Sec. 19, and the NW. ¼ of Sec. 20, T. 14 S., R. 69 W. of the 6th P. M.

EXPENDITURE OF FIVE HUNDRED DOLLARS.

I certify that the value of the labor and improvements upon this claim, placed thereon by the claimants and their grantors, is not less than five hundred dollars, and that said improvements consist of:

Placer workings, the center of the northeasterly end of which bears from Cor. No. 15, Cumro placer, N. 46° W. 285 ft., averaging 40 ft. wide and 8 ft. deep, and extending S. 62° W. 120 ft. along the bed of Cumro creek.
Value, $800.

The discovery shaft of the Poorman lode, which bears from Cor. No. 5 N. 56° 48′ W. 155.7 ft., 6 x 4 ft., 12 ft. deep. Value, $100.

The discovery cut of the Podunk lode, the face of which bears from Cor. No. 4 S. 88° 13′ E. 205.2 ft., 5 ft. wide, 10 ft. face, running N. 50° E. 24 ft. in earth and rock.
Value, $110.

The incline discovery shaft of the Ætna lode, the mouth of which is on the center line 75 ft. from the center of line 4–1, 4½ x 6 ft., 24 ft. deep in rock, timbered, course S. 48°, dip 60°.
Value, $250.

The last 120 ft. of a tunnel, the mouth of which bears from Cor. No. 6, Poorman lode, N. 67° 48′ E. 582 ft., 5 x 6 ft., running N. 10° 44′ W. 515 ft. to breast. The point of discovery of the Hawley lode is in this tunnel 475 ft. from the mouth, and bears from Cor. No. 1 N. 75° 52′ E. 702.5 ft.
Value of last 120 ft., $2,800.

This tunnel is in course of construction for the development of this claim and Surs. Nos. 6582 and 6583, Roy and Raymond lodes, claimants unknown. An undivided half interest in the first 375 ft. of this tunnel has been credited to each of the last two mentioned surveys.

A shaft on the center line of the Hawley lode 672 ft. from the center of line 1–2, 3½ x 6 ft., 20 ft. deep in earth and rock, timbered, at the bottom of which is a drift 4 x 6 ft. running N. 86° E. 18 ft.
Value of shaft and drift, $300.

The surface embraced by this claim ascends rapidly from the mouth of the tunnel towards Cor. No. 3 of the Poorman lode, the northerly ends of the Poorman, Ætna, and Podunk lodes being from 300 to 500 ft. higher than the mouth of the tunnel. The veins of the Ætna and Podunk lodes dip about 60° to the SW. The tunnel, described and included in the estimate of expenditure, continued in its present course, will cut the veins of the several locations at great depth, whereby by one sys-

tem of workings and one plant of machinery the entire claim can be most advantageously and economically developed.

OTHER IMPROVEMENTS.

A shaft which bears from Cor. No. 20 Cumro placer, S. 48° 30′ W. 305 ft., 3 x 5 ft., 12 ft. deep in earth and gravel; A. K. Smith, claimant.

A log cabin, the West corner of which bears from Cor. No. 13 Cumro placer, S. 40° E. 120 ft., 12 x 16 ft., course of long sides N. 44° E.

A log cabin, the NW. Cor. of which bears from Cor. No. 3 Sur. No. 8000 B, Poorman mill site, S. 10° 40′ E. 107 ft., 16 ft. square, course of sides S. 3° E. Said cabins belong to claimants herein.

INSTRUMENT.

This survey was made with a Gurley Light Mountain Transit. The courses were deflected from the true meridian as determined by direct solar observations. The distances were measured with 50-ft. and 500-ft. steel tapes.

NOTE.—The disagreements between these field notes and the location certificates of the Hawley and Ætna lodes and the Poorman mill site, with regard to the position of the discovery point and the course of the boundary lines, are due to errors in the latter.

NOTE.—Neither E. E. Ames nor myself, who appear as locators of the Hawley lode, held any interest, directly or indirectly, in this claim at the time of making the survey, having sold our interests in June, 1890.

(4—685.)

FINAL OATHS FOR SURVEYS.

LIST OF NAMES.

A list of the names of the individuals employed by....A. L. Hawley...., United States deputy mineral surveyor, to assist in running, measuring and marking the lines, corners, and boundaries described in the foregoing field notes of the survey of the mining claim of....T. E. Jenkins *et al*.... , known as the....Cumro placer and Poorman, Hawley, Ætna, and Podunk lodes, and Poorman mill site,.... and showing the respective capacities in which they acted:

...., *Chainman.*
....E. E. AMES....., *Chainman.*
... G. W. TROMMLITZ..., *Axman.*
....., *Flagman.*

FINAL OATHS OF ASSISTANTS.

We,...E. E. Ames...and...G. W. Trommlitz ...., do solemnly swear thatwe assisted ... A. L. Hawley...., United States deputy mineral surveyor, in marking the corners and surveying the boundaries of the mining claim of....T. E. Jenkins *et al*...., known as the ....Cumro placer and Poorman, Hawley, Ætna, and Podunk lodes, and Poorman mill site...., represented in the foregoing field-notes as having been surveyed by said deputy mineral surveyor and under his direction; and that said survey has been in all respects, to the best of our knowledge and belief, faithfully and correctly executed, and the corner and boundary monuments established according to law and the instructions furnished by the United States Surveyor General for....Colorado....

....., *Chainman.*
....E. E. AMES....., *Chainman.*
....G. W. TROMMLITZ..., *Axman.*
....., *Flagman.*

Subscribed and sworn to by the above-named persons before me this....13th....day of....February...., 1893.

[SEAL] ....A. L. HAWLEY....,
....*Notary Public*....,
....*El Paso County, Colorado.*

My commission expires July 28th, 1896.

(4—686.)

FINAL OATH OF UNITED STATES DEPUTY MINERAL SURVEYOR.

I,....A. L. Hawley...., United States deputy mineral surveyor, do solemnly swear that, in pursuance of instructions received from the United States Surveyor General for.... Colorado....,dated....February6th,1893 ..., I have, in strict conformity to the laws of the United States, the official regulations and instructions thereunder, and the instructions of said Surveyor General, faithfully and correctly executed the survey of the Mining Claim of....T. E. Jenkins *et al*...., known, as the.... Cumro placer and Poorman, Hawley, Ætna, and Podunk lodes, and Poorman mill site...., situate in.... Pike's Peak.... Mining District...., El Paso....County...., Colorado...., in Sections 17, 19, and 20...., Township No....14 S...., Range No....69 W. of the 6th P. M...., and designated as Survey No....8000 A and B...., as represented in the foregoing field notes, which accurately show the boundaries of said mining claim as distinctly marked by monuments on the ground, and described in the attached copy of each location certificate, which was received by me from the Surveyor General with said instructions, and that all the corners of said survey have been established and perpetuated in strict accordance with the law, official regulations and instructions thereunder; and I do further solemnly swear that the foregoing are the true and original field notes of said survey and my report therein, and that the labor expended and improvements made upon said mining claim by claimants or....their....grantors are as therein fully stated, and that the character, extent, location, and itemized value thereof are specified therein with particularity and full detail, and that no portion of said labor or improvements so credited to this claim has

been included in the estimate of expenditures upon any other claim.....
.....
...A. L. HAWLEY....,
United States Deputy Mineral Surveyor.

Subscribed and sworn to by the said.... A. L. Hawley...., United States deputy mineral surveyor, before me,....a Justice of the Peace in and for El Paso County, Colorado ...., this....20th....day of....February...., 1893.

....GEO. K. KIMBALL....,
Justice of the Peace.

LOCATION CERTIFICATE—PLACER CLAIM.

KNOW ALL MEN BY THESE PRESENTS, That I, T. E. Jenkins, the undersigned citizen of the United States, resident of the County of Arapahoe and State of Colorado, having complied with the provisions of Chapter 6. Title XXXII, of the Revised Statutes of the United States, and with local customs, laws and regulations, claim by right of discovery and location, as a placer claim, the following described premises, situate, lying and being in Pike's Peak mining district, County of El Paso, and State of Colorado, to wit:

The SE. ¼ of the SW. ¼, and the S. ½ of the SW. ¼ of the SW. ¼ of Sec. 17, T. 14 S., R. 69 W. of the 6th P. M. To be known as the CUMBO PLACER.

Located May 1st, 1892.

Date of certificate, June 4th, 1892.

T. E. JENKINS.

LOCATION CERTIFICATE—LODE CLAIM.

STATE OF COLORADO, } *ss:*
County of..El Paso.. }

KNOW ALL MEN BY THESE PRESENTS, That ....O. F. Shattuck...., the undersigned, has this....4th....day of....May....1892, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with local customs, laws, and regulations....1500....linear feet and horizontal measurement on the... Poorman....lode, vein, ledge, or deposit, along the vein thereof, with all its dips, angles, and variations, as allowed by law, together with .... 150 ...feet on the....westerly....side and....150 feet on the....easterly....side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges, or deposits and surface ground within the lines of said claim....620....feet running....N. 48° 46' E. ....from center of discovery....shaft ...and ....880....feet running....S. 17° 38' W.... from center of discovery....shaft....; said discovery....shaft....being situate upon said lode, vein, ledge, or deposit, and within the lines of said claim, in....Pike's Peak.... Mining District, County of....El Paso.... and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at Corner No. 1,....Whence Cor. to Secs. 17, 18, 19, and 20, T. 14 S., R. 69 W. bears S. 27° 28' E. 393.26 ft., thence N 17° 38' E. 831.34 ft. to Cor. No. 2, thence N. 48° 46' E. 661.7 ft. to Cor. No. 3, thence S. 41° 14' E. 300 ft. to Cor. No. 4, thence S. 48° 46' W. 578 ft. to Cor. No. 5, thence S. 17° 38' W. 929.04 ft. to Cor. No. 6, thence N. 41° 14' W. 350.48 ft. to Cor. No. 1, the place of beginning.....

Said lode was discovered on the 12th...day of.. April..., A. D. 1892.	..O. F. SHATTUCK..	[SEAL.]
	.....	[SEAL.]
Attest:	.....	[SEAL.]
Date of location... May 4th..., A. D. 1892.	.....	[SEAL.]
	.....	[SEAL.]
Date of certificate.. June 1st..., A. D. 1892.	.....	[SEAL.]

AMENDED LOCATION CERTIFICATE—LAW OF 1889.

STATE OF COLORADO, } *ss:*
County of..El Paso.. }

KNOW ALL MEN BY THESE PRESENTS, That ....A. L. Hawley and E. E. Ames...., the undersigned, have this....4th....day of.... May...., 1888, amended, located, and claimed, and by these presents do amend, locate, and claim, by right of discovery and amended location, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with section 2409 of the general laws of Colorado, and with local customs, laws, and regulations....1500....linear feet and horizontal measurement, on the.... Hawley....lode, vein, ledge, or deposit, along the vein thereof, with all its dips, angles, and variations, as allowed by law, together with... 150 feet on each side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, or deposits and surface ground within the lines of said claim....800 feet running....easterly....from center of discovery....point in tunnel...., and... 700 ....feet running....westerly....from center of discovery....point...., said discovery.... point....being situate upon said lode, vein, ledge, or deposit, and within the lines of said claim in....Pike's Peak Mining District, County of .. El Paso... , and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at Corner No. 1....whence Cor. to Secs. 17, 18, 19, and 20, T. 15 S., R. 69 W. bears S. 18° 4' E. 606.1 ft., thence N. 3° 48' E. 300 ft. to Cor. No. 2, thence N. 87° E. 1500 ft. to Cor. No. 3, thence S. 3° 48' W. 300 ft. to Cor. No. 4, thence S. 87° W. 1500 ft. to Cor. No. 1, the place of beginning.... This being the same lode originally located on the....17th ... day of.....September.....1886, and recorded on the....12th....day of....December....1886, in Book....4...., Page....48, in the office of the Recorder of....El Paso ... County. This further and amended certificate of location is made without waiver of any previously acquired rights, but for the

purpose of correcting any errors in the original location, description, or record.....

Said lode was discovered the..12th..day of..Sept. .., A. D. 1888.	...A. L. HAWLEY...	[SEAL.]
	...E. E. AMES.....	[SEAL.]
	....	[SEAL.]
Attest:.....	....	[SEAL.]
Date of amended location ..May..4th.., 1888.	.....	[SEAL.]
	.....	[SEAL.]
Date of amended certificate..July 14th.., A. D. 1888.	....	[SEAL.]

LOCATION CERTIFICATE—LODE CLAIM.

STATE OF COLORADO, } *ss:*
County of..El Paso.. }

KNOW ALL MEN BY THESE PRESENTS, That ....Grant Safely...., the undersigned, has this....4th....day of....June...., 1892, located and claimed and by these presents does locate and claim, by right of discovery and location, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with local customs, laws, and regulations....1500....linear feet and horizontal measurements on the ...Ætna ....lode, vein, ledge, or deposit, along the vein thereof, with all its dips, angles, and variations, as allowed by law, together with.... 150....feet on the....southwesterly....side, and....150 ...feet on the....northeasterly ...side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges, or deposits and surface ground within the lines of said claim....75....feet running....N. 40° W....from center of discovery....cut.... and 1425....feet running S. 40° E ...from center of discovery....cut....; said discovery....cut....being situate upon said lode, vein, ledge, or deposit, and within the lines of said claim in....Pike's Peak....Mining District, County of ...El Paso...., and State of Colorado, described by metes and bounds, as follows, to wit:

Beginning at Corner No. 1....whence SW. Cor. Sec. 17, T. 15 S., R. 69 W. bears S. 38° 2' E. 1465 ft.. thence S. 40° E. 1500 ft. to Cor. No. 2, thence N. 50° E. 300 ft. to Cor. No. 3, thence N. 40° W. 1500 ft. to Cor. No. 4, thence S. 50° W. 300 ft. to Cor. No. 1, the place of beginning.....

Said lode was discovered on the...1st...day of.. May.., A. D. 1892.	..GRANT SAFELY...	[SEAL.]
	.....	[SEAL.]
	.....	[SEAL.]
Attest:.....	.....	[SEAL.]
Date of location...June 4th.., A. D. 1892.	....	[SEAL.]
	....	[SEAL.]
Date of certificate..July 6th.., A. D. 1892.	.. ..	[SEAL.]
	.....	[SEAL.]

ADDITIONAL AND AMENDED LOCATION CERTIFICATE.

LAW OF 1889.

STATE OF COLORADO, } *ss:*
County of..El Paso.. }

KNOW ALL MEN BY THESE PRESENTS, That ....John H. Routt...., the undersigned, has this .... 4th .... day of .... May ..., 1891, amended, located, and claimed, and by these presents does amend, locate, and claim, by right of the original discovery and this additional and amended location certificate, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with section 2409 of the General Statutes of Colorado, and with local customs, laws, and regulations....1500....linear feet and horizontal measurement on the ....Podunk....lode, vein, ledge, or deposit, along the vein thereof, with all its dips, angles, and variations, as allowed by law, together with ....150....feet on each side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, or deposits and surface ground within the lines of said claim....140 ....feet running....N. 41° 14' W.... from center of discovery....cut ...and....1360 ....feet running....S. 41° 14' E.... from center of discovery... cut ...., said discovery ....cut....being situate upon said lode, vein, ledge, or deposit, and within the lines of said claim in....Pike's Peak... Mining District, County of....El Paso...., and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at Cor. No. 1....whence the SW. Cor. Sec. 17, T. 15 S., R. 69 W. bears S. 38° 2' W. 1465 ft., thence S. 41° 14' E. 1500 ft. to Cor. No. 2, thence S. 48° 46' W. 300 ft. to Cor. No. 3, thence N. 41° 14' W. 1500 ft. to Cor. No. 4, thence N. 48° 46' E. 300 ft. to Cor. No. 1, the place of beginning.... This being the same lode originally located on the ....6th....day of....April...., 1888, and recorded on the ....14th....day of....June...., 1888, in Book ....3...., Page....48..... in the office of the Recorder of....El Paso....County. This further additional and amended certificate of location is made without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original location, description, or record, and of taking in and acquiring all forfeited or abandoned overlapping ground, and of taking in any part of any overlapping claim which has been abandoned, and of securing all the benefits of said section 2409 of the General Statutes of Colorado.

Said lode was discovered the..1st. day of..April .., A. D. 1888.	..JOHN H. ROUTT..	[SEAL.]
	.....	[SEAL.]
	.....	[SEAL.]
Attest:.....	.....	[SEAL.]
Date of additional and amended certificate.. June 14th.., 1891.	.....	[SEAL.]
	.....	[SEAL.]
	.....	[SEAL.]

LOCATION CERTIFICATE OF MILL SITE.

To all whom these presents may concern:

KNOW YE, That I, A. E. Lowe, of the County of Arapahoe, and State of Colorado, do hereby declare and publish as a legal notice to all the world, that I have a valid right to the occupation, possession, and enjoyment of all and singular that tract or parcel of land, not exceeding five acres, situate, lying and being in the County of El Paso, and State of Colorado, bounded and described as follows:

POORMAN MILL SITE.

Beginning at Cor. No. 1, whence the NE. Cor. Sec. 19, T. 14 S., R. 69 W. bears N. 46° 48' E. 3416.9 ft., thence S. 85° 50' W. 921.2 ft. to Cor. No. 2, thence N. 37° 00' E. 467.66 ft. to Cor. No. 3, thence S. 64° 00' E. 700 ft. to Cor. No. 1, the place of beginning.

Containing 4 acres more or less.

Variation 14° 45' E.

Together with all and singular the hereditaments and appurtenances thereto belonging or in anywise appertaining.

Witness my hand and seal this 5th day of December, A. D. 1891.

[SEAL.] A. E. LOWE.

(4—694.)

SURVEY No. 8000 A.

TITLE PAGE TO REPORT UNDER CIRCULAR "N" OF SEPT. 23, 1882.

REPORT

Under General Land Office Circular "N" of September 23, 1882, upon the Placer Mining Claim known as the....Cumro Placer...., claimed by ...T. E. Jenkins *et al*...., situate in....Pike's Peak....Mining District....,El Paso.... County....,Colorado... ,embracing 32.07 acres, and forming a portion of the S. half of the SW. quarter....in Sec....17...., Town....14 S...., Range 69 W. of the 6th P. M.....

Examination made..February 15th.., 1893.
.....By A. L. HAWLEY....,
U. S. Deputy Mineral Surveyor.

SURVEY No. 8000 A.

CUMRO PLACER.

a The soil embraced in this claim consists of decomposed mineral-bearing granite on the mountain slopes, and auriferous sand and gravel along the creek bottom, all covered with a thin layer of loam and alluvium supporting a scant growth of grass and sage brush, with scattering pine, spruce, cedar, and cottonwood timber.

b The only stream passing through this claim is Cumro creek, 4 ft. wide and about 2 ft. deep, which crosses the extreme southeast corner.

A log cabin, the west corner of which bears from Cor. No. 13 S. 40° E. 120 ft., 12 x 16 ft., course of long sides N. 44° E.

c The surface and underground workings on this claim consists of:

A tunnel, the mouth of which bears from Cor. No. 7 N. 67° 48' E. 582 ft., 5 x 6 ft., running N. 10° 44' W. 515 ft. to breast.

A shaft, which bears from Cor. No. 20 S. 48° 30' W. 305 ft., 3 x 5 ft., 12 ft. deep in earth and rock.

Placer workings, the center of the northeasterly end of which bears from Cor. No. 15 N. 46° W. 285 ft., averaging 40 ft. wide and 8 feet deep, and extending S. 62° W. 120 ft. along the bed of Cumro creek.

d The nearest post office to the claim is Jamestown, a mining camp of about 300 population located on Brush creek about 2 miles south of the claim. The nearest railroad station is Tie Siding, a spur and flag station on the Denver, Apex and Western R. R., at the confluence of Cumro and Plum creeks, about 6 miles southwesterly from the claim.

e Other than the system of lode deposits adjoining and forming a part of this claim, there are none nearer than Carbonate, situate about 4 miles to the northeast.

f This claim is peculiarly adapted for placer-mining purposes, inasmuch as the contour of the surface and the character and nature of the soil are such that it can be most advantageously and cheaply worked by hydraulic giants and the tailings be rapidly and easily disposed of. Cumro creek carries about 50 cu. ft. of water per second during the dry season, being an abundance of water for working the claim. As yet no water has been taken upon the claim for its development, except in washing the placer workings hereinbefore described; but, by a survey, it has been found that by a ditch not over one mile in length, water can be taken from Cumro creek onto the highest portions of the claim. It being the express intention of the claimants to work the claim in this manner.

g The works and expenditures made by the claimants for the development of the claim consist of the placer workings described under paragraph c of this report.

h There are no mines, salt licks, salt springs, or mill seats upon this claim.

(4—695.)

OATH OF UNITED STATES DEPUTY MINERAL SURVEYOR.

UNDER GENERAL LAND OFFICE CIRCULAR "N" OF SEPT. 23, 1882.

I, ...A. L. Hawley...., U. S. Deputy mineral surveyor, do solemnly swear that in pursuance of an order received from the U. S. Surveyor General for....Colorado...., dated ....February 6th... , 1893, I have made, under the provisions of General Land Office Circular "N," approved September 23, 1882, a personal and thorough examination, upon the premises, of the placer mining claim of....T. E. Jenkins *et al*...., known as the ... Cumro placer...., situate in ...Pike's Peak....Mining District, ...El Paso.... County, ...Colorado ..., embracing.... 32.07 acres and forming a portion of the S. ½

of the SW. ¼ of Sec. 17..., in Township No. 14 S...., Range No....69 W. of the 6th P. M. ...., and that my report of such examination, hereto attached, is specific and in detail, and is a full and true statement of the facts upon all the points specified in said circular.

.....A. L. HAWLEY....,
U. S. Deputy Mineral Surveyor.

Subscribed and sworn to by the said... A. L. Hawley...., U. S. Deputy mineral surveyor, before me, ...a notary public in and for El Paso County, Colorado...., this.... 20th....day of....February, 1893.

[SEAL.] .....B. F. CLARK....,
.....*Notary Public*.....

My commission expires December 20, 1893.

(4-696.)

CORROBORATIVE AFFIDAVIT UNDER GENERAL LAND OFFICE CIRCULAR "N" OF SEPT. 23, 1882.

STATE OF COLORADO, }
County of ...El Paso.... } *ss:*

....W. H. Wilson....and....J. P. Thompson...., being first duly sworn, severally depose and say that he is personally and well acquainted with the placer mining claim of ....T. E. Jenkins *et al*...., known as the ....Cumro placer... , situate in ....Pike's Peak...Mining District..., El Paso...County, Colorado...., embracing....32.07 acres and forming a portion of the S. ½ of the SW. ¼ of Sec. 17, ...in Township No....14 S...., Range No....69 W. of the 6th P. M....; and also with the character of all the land included in said claim, and has been so acquainted for....10 and 12....years last past; that his knowledge of said claim and land is derived from....prospecting the ground and working the claim...., and is such as to enable him to testify understandingly with regard thereto; that he has carefully read the foregoing report of....A. L. Hawley...., U. S. Deputy mineral surveyor, and that to his own personal knowledge said report is in all respects true and accurate.

.....W. H. WILSON....
.... J. P. THOMPSON....

Subscribed and sworn to by the above-named persons this....20th....day of....February...., 1893.

[SEAL.] .....B. F. CLARK.....,
....*Notary Public*....

My commission expires December 20, 1893.

(4-687.)

SURVEYOR GENERAL'S CERTIFICATE OF APPROVAL OF FIELD NOTES AND SURVEY OF MINING CLAIM.

DEPARTMENT OF THE INTERIOR,
OFFICE OF U. S. SURVEYOR GENERAL,
.....,
....., 18..

I, U. S. Surveyor General for ....., do hereby certify that the foregoing and hereto attached field notes and return of the survey of the mining claim of ....., known as the ....., situate in ..... mining district, ... County, ..., in Section ...., Township No. ...., Range No. ...., designated as Survey No. ....., executed by ...., U. S. deputy mineral surveyor, ..., 18.., under my instructions dated ....., 18.., have been critically examined and the necessary corrections and explanations made, and the said field notes and return, and the survey they describe, are hereby approved. A true copy of the copy of the location certificate filed by the applicant for survey is included in the field notes.

....,
U. S. Surveyor General
For .....

UNITED STATES SURVEYOR GENERAL'S FINAL CERTIFICATE ON FIELD-NOTES.

DEPARTMENT OF THE INTERIOR,
OFFICE OF U. S. SURVEYOR GENERAL,
.....,
....18...

I, U. S. Surveyor General for ....., do hereby certify that the foregoing transcript of the field notes, return, and approval of the survey of the mining claim of ....., known as the ....., situated in ..... mining district, ... County, ..., in Section ...., Township No. ...., Range No. ...., and designated as Survey No. ..., has been correctly copied from the originals on file in this office; that said field notes furnish such an accurate description of said mining claim as will, if incorporated into a patent, serve fully to identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof.

And I further certify that five hundred dollars' worth of labor has been expended or improvements made upon said mining claim by claimant or ..... grantors, and that said improvements consist of ....., and that no portion of said labor or improvements has been included in the estimate of expenditures upon any other claim.

I further certify that the plat hereof, filed in the U. S. Land Office at ....., is correct and in conformity with the foregoing field-notes.

....,
U. S. Surveyor General
For .....

APPENDIX A.

CIRCULAR TO APPLICANTS.

To Applicants for Mineral Survey Orders:

You will observe the following requirements in the conduct of your business with the Surveyor General's Office, the same being based upon the United States mining laws

and circular and special instructions from the Commissioner of the General Land Office:

1. All applications for survey orders, descriptive reports on placer claims, or certificates of $500 expenditure, should be addressed to the Surveyor General* and be signed by the claimants, their agent or attorney.

2. Each application should contain:

(*a*) The name of the claimant in full, and as it is desired to appear in the application for patent.

(*b*) The name of each location embraced in the claim.

(*c*) The name of the land and mining districts in which the claim is located.

(*d*) The name of the United States deputy mineral surveyor to whom it is desired the order shall be issued.

(For form of application see page 27.)†

3. You are required to file with each application for survey order, a copy of the record of location of the claim, properly certified by the recorder of the county or mining district where the claim is situate.

4. The deputy mineral surveyor is required to survey the claim in *strict conformity* with or *within* the lines of the location upon which the order of survey is based. You are, therefore, advised before filing your application to see that your location has been made in compliance with the law and regulations, and that it properly describes the claim for which the patent is sought.

The act of Congress of May 10, 1872, expressly provides that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced," and "that all records of mining claims hereafter made shall contain the name or names of the locators, the date of location, and such a description of the claim or claims, located by reference to some natural object or permanent monument, as will identify the claim."

"These provisions of the law must be strictly complied with in each case to entitle a claimant to a survey and patent, and therefore should a claimant under a location made *subsequent* to the passage of the mining act of May 10, 1872, who has not complied with said requirements in regard to marking the location upon the ground, and recording the same, apply for a survey, you will decline to make it."

"The only relief for a party under such circumstances, will be to make a new location in conformity to law and regulations, as no case will be approved by this office, unless these and all other provisions of law are substantially complied with." (See General Land Office circular dated Nov. 20, 1878.)

5. Paragraph 99, General Land Office circular of December 10, 1891, edition December 1, 1894, relating to the expense of office work connected with the survey of mineral claims, reads as follows:

"With regard to the *platting* of the claim and other *office work* in the Surveyor General's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer, or designated depository, in favor of the United States treasurer, to be passed to the credit of the fund created by 'individual depositors for surveys of the public lands,' and file with the Surveyor General duplicate certificates of such deposits in the usual manner."

6. The various Surveyors General have adopted schedules of rates for office work, and an estimate of the cost in any particular case may be had upon application.

Should an applicant deem an estimate excessive, he will be allowed the right of appeal to the General Land Office in the usual manner.

In transmitting such an appeal the Surveyor General should transmit therewith a full report.

7. Should the office work in any case amount to more than the estimate, or if an amended order is issued, an additional deposit will be required.

8. In districts where there are no United States depositories, you should deposit with the nearest assistant United States treasurer, or depository, and in all cases immediately forward the original certificate to the Secretary of the Treasury and the duplicate to the Surveyor General's office, retaining the triplicate for your own use and security. Under no circumstances will the deposit be made by the Surveyor General. (See paragraph 5, preceding.)

9. An application for an amended survey order must be accompanied with a statement setting forth fully the reasons for the pro-

*See page 172 of this book for list of offices of United States Surveyors General. †Page 157 of this book.

posed amendment and all the material facts in the matter.

10. If, after having obtained a survey order, you should abandon your purpose of having a survey made, you can apply the deposit, less the amount estimated for office expenses already incurred, on a new survey if one is desired.

11. Upon discovery of any error or defect in an order you are requested to return it to the Surveyor General's Office for correction or amendment.

12. If, after having obtained an order for survey, you should find that the record of location does not practically describe the location as staked upon the ground, you should file a certified copy of an amended location certificate, correctly describing the claim, and obtain an *amended order* for survey. If a relocation of the claim is made embracing ground not included in the original order, or other material change is made, you will abandon the original number of the order for survey, and a new order will be issued in which a number in the current series will be substituted.

13. The order of approval of surveys of mineral claims is prescribed by General Land Office circular dated March 3, 1881, as follows:

"The mining survey first applied for shall have the priority of action in all its stages in the office of the Surveyor General, including the delivery thereof, over any other survey of the same ground or any portion thereof.

"The Surveyor General should not order or authorize a survey of a claim which conflicts with one previously applied for until the survey first applied for has been completed, examined, approved, and platted, and the plats delivered.

"When the conflict does not appear until the field notes of the respective surveys are returned, then the survey first applied for should be first examined, approved, and platted, and the plats delivered before the field notes of the survey last applied for are taken up for examination or plats constructed.

"When the survey first authorized is not returned within a reasonable period, and the applicant for a conflicting survey makes affidavit that he believes (stating the reasons for his belief) that such first applicant has abandoned his purpose of having a survey made, or is deferring it for vexatious purposes, to wit, to postpone the subsequent applicant, the Surveyor General shall give notice of such charges to such first applicant, and call upon him for an explanation under oath of the delay. He shall also require the deputy mineral surveyor to make a full statement in writing, explanatory of the delay; and if the Surveyor General shall conclude that good and sufficient reasons for such delay do not exist, he shall authorize the applicant for the conflicting survey to proceed with the same; otherwise the order of proceedings shall not be changed.

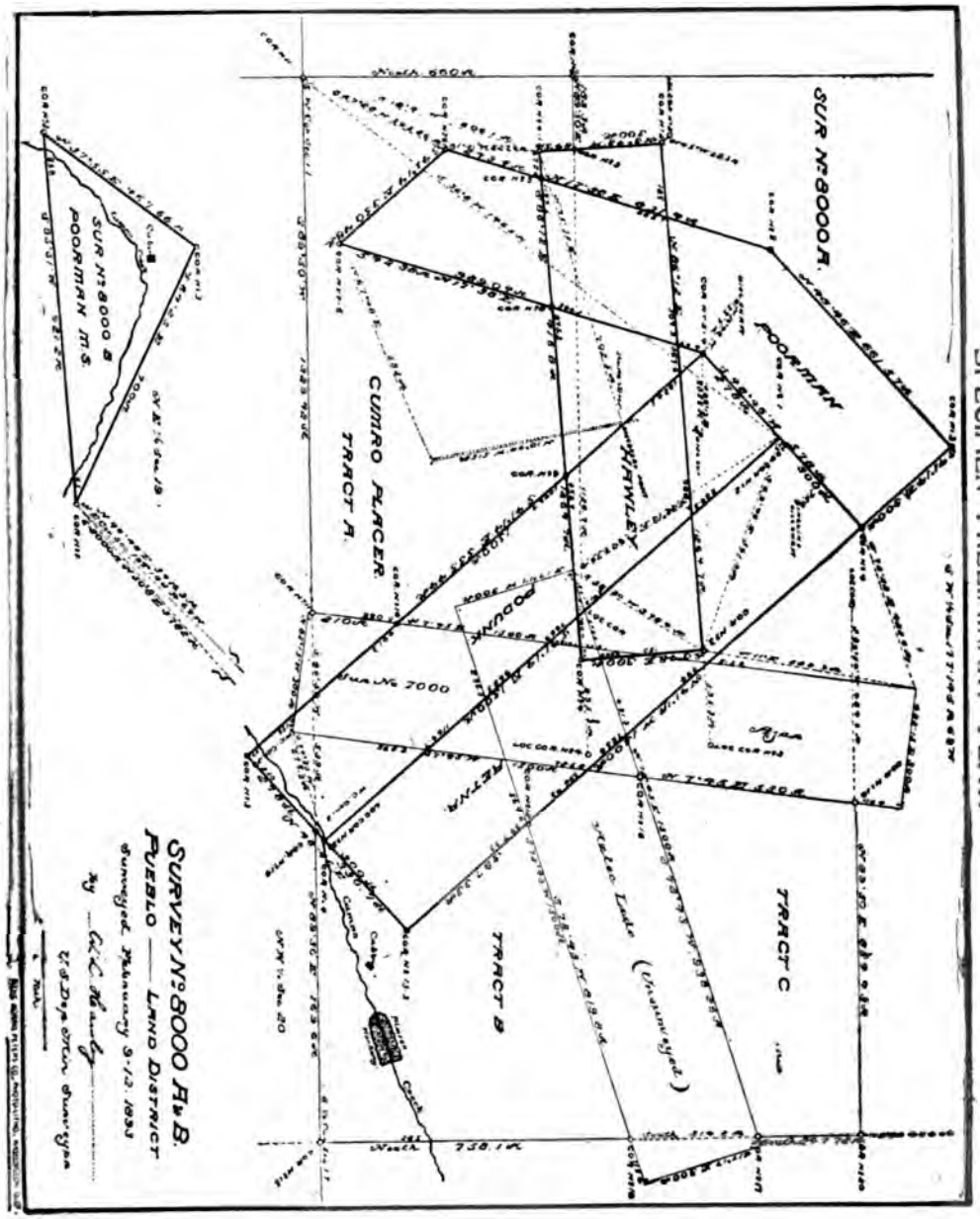
"Whenever an applicant for a survey shall have reason to suppose that a conflicting claimant will also apply for a survey for patent, he may give a notice in writing to the Surveyor General particularly describing such conflicting claim and file a copy of the notice of location of such conflicting claim. In such case the Surveyor General will not order or authorize any survey of such conflicting claim until the survey first applied for has been examined, completed, approved, and platted and the plats delivered."

14. You have the option of employing any United States deputy mineral surveyor in the district to execute the order of survey, and must make satisfactory arrangments with such surveyor for the payment for his services and those of his assistants in making the survey, as the United States will not be held responsible for the payment of the same. The duty of the deputy surveyor in any particular case ceases when he has executed the survey and returned the same to this office. He is not allowed to prepare for the mining claimant the papers in support of an application for patent, being precluded from acting either directly or indirectly as attorney in mineral claims. (Sec. 2334, United States Revised Statutes; *see Appendix B hereof.)

15. You are advised of your right to appeal to the Commissioner of the General Land Office from the approval or disapproval of the survey of your claim. The appeal must be in writing or in print, should set forth in brief and clear terms the specific points of exception to the ruling appealed from, and should be transmitted through the Surveyor General's office.

*Page 835.

"SPECIMEN" PRELIMINARY PLAT.



MINING DISTRICTS AND SURVEYORS GENERAL.

Alaska	Sitka.
Arizona	Tucson.
California	San Francisco.
Colorado	Denver.
Idaho	Boise City.
Montana	Helena.
Nevada	Reno.
New Mexico	Santa Fe.
Oregon	Portland.
South Dakota	Huron.
Utah	Salt Lake City.
Washington	Olympia.
Wyoming	Cheyenne.

4. *End Lines.*

(See p. 46.)

POSTING.

I. THE STATUTE.
II. REGULATIONS.
III. DECISIONS.

I. THE STATUTE.

(See sec. 2325, U. S. Rev. Stat., p. 137.)

II. REGULATIONS.

29. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, mine, or lode; the mining district and county; whether the location is of record, and, if so, where the record may be found; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well-defined place on the claim; the name or names of adjoining claimants on the same or other lodes; or, if none adjoin, the names of the nearest claims, &c.

30. After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat and the field notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses, that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the *notice* so posted to be attached to, and form a part of, said affidavit.

43. In sending up the papers in the case the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued.

III. DECISIONS.

1. Though publication of notice of application for a mineral patent in a weekly paper must continue sixty-three days, it does not follow that notice by posting must cover that time. The requirement is that there must be sixty days of contemporaneous publication and posting. Great Western Lode, 5 L. D. 510.

2. To bar the rights of adverse claimants notice of application must be given for sixty days, concurrently, by publication, posting on the claim and in the land office. Tilden v. Intervenor M. Co., 1 L. D. 572.

3. Where a mineral application is presented at the local land office before the plat and notice have been posted on the claim, such application is void. De Long v. Hine, 1 L. D. 545.

4. Though the affidavit of posting of notice and plat should not be made before claimant's attorney, as notary public, an affidavit so made is irregular but not void. Bright v. Elkhorn M. Co., 9 L. D. 503.

5. An affidavit of continuous posting of plat and notice of application upon the claim need not be based upon continuous personal observation of the same. Bright v. Elkhorn M. Co., 9 L. D. 503; Tangerman v. Aurora Hill M. Co., 9 L. D. 538.

6. Proof of posting notice and diagram on the mining claim should be specific as to when the *period* of such posting commenced. Prince of Wales Lode, 2 C. L. O. 2.

7. It is too late to raise a technical objection to the affidavit of posting the plat and notice after action on said affidavit and the allowance of the entry. The affidavit of posting may be properly made by a claimant whose knowledge of the fact is derived from personal observation at various times of the plat and notice as posted, and from such information with respect thereto as could be accepted by a reasonably cautious man. Bright v. Elkhorn M. Co., 9 L. D. 503.

8. Where an entry is defective in that proper posting of notice of application and plat upon the claim is not shown, the claimant should be allowed to give new notice by

publication and posting. Cornell Lode, 6 L. D. 717.

9. Where a mineral entry is allowed, and it is shown at a hearing that the plat and the notice of application for patent were hidden upon the claim instead of being posted in a conspicuous place thereon, the entry will be canceled without prejudice to claimant's right to begin proceedings *de novo* to acquire patent. Pratt v. Avery, 7 L. D. 554.

10. Posting on the claim must be in a conspicuous place. Failure to so post necessitates new notice by publication and posting. Ferguson v. Hanson, 21 L. D. 386.

11. An open shaft-house is a "conspicuous place" upon a claim for the posting of notice of application for patent. Louisville Lode, 1 L. D. 548.

12. Posting of plat and notice of application for patent upon a shaft-house is posting in a conspicuous place, as "the shaft-house is certainly the most conspicuous object on a mining claim, especially where, as in the case at bar, there were no other improvements." Gowdy v. Kismet G. M. Co., 23 L. D. 624.

13. The plat and notice of application for patent for a mining claim may be posted upon ground excluded from the application if in a conspicuous place. Hughes v. Gilbert, 2 L. D. 756.

14. A mineral entry may be referred to the Board of Equitable Adjudication, where posting of plat and notice of application for patent was not made on the claim owing to inaccessibility and danger of snow slides, but in a conspicuous place on an adjoining claim. Rowena Lode, 7 L. D. 477.

15. Only one plat is required to be made and posted on a consolidated claim. S. F. Mackie, 5 L. D. 199.

16. Although under the law and regulations notice of application for patent for a lode and mill site should be posted both on the lode and the mill site, in this particular case, in view of the extensive improvements on the mill site, the entry is passed to patent though posting was not made on the mill site. Bailey and Grand View M. & Sm. Co., 3 L. D. 386. (Modified in New York Lode & Mill Site, 5 L. D. 513, and an entry referred to the Board of Equitable Adjudication under like circumstances.)

17. Where the evidence on behalf of applicant is clear and specific as to conspicuous posting of notice and diagram on the claim for the period required by law, such evidence will be deemed satisfactory even though allegations to the contrary are made by protestants. Omaha Gold M. Co., 3 C. L. O. 36.

18. Where the evidence is conflicting as to whether notice of application was conspicuously posted upon the claim, the contest will be dismissed if the contestant had actual notice through reading the published notice of application. Byrne v. Slauson, Departmental decision of January 21, 1895.

19. The period of publication within which adverse claims must be filed ceases to run against adverse claimants if the posting of notice in the land office is not continuous. Tilden v. Intervenor M. Co., 1 L. D. 572.

20. Notice of application for a mineral patent must be posted during the period of publication in the local land office of the district wherein the claim is situate, and if, during such period, the boundaries of land districts are changed, the notice must be changed, if necessary, to comply with the rule; otherwise republication and new posting will be required. Frederick A. Williams, 17 L. D. 282.

21. Where it is impossible to show positively that notice of an application for a mineral patent remained posted in the local land office during the period of publication, the affidavits of the persons who were local officers during such period, to the effect that it was their custom to post such notices during the period of publication, may be accepted as satisfactory. Departmental decision of June 18, 1896, *In re* S. H. Standart.

22. Proof of posting of notice of application for patent in the local land office should be furnished by the register, but, if not furnished by him, the claimant may submit evidence upon the point. Mimbres M. Co., 8 L. D. 457.

23. When the land claimed lies in two districts, notices of application should be posted in the offices in both districts, and the application for patent should be filed in the district where the principal workings are. Com'r to San Francisco Office, Nov. 12, 1875.

24. Where the notices of application for patent were sufficiently definite in the matter of description of the claim to cause an adverse claim to be filed, republication of notice will not be required because of an error

in the survey of ten degrees in the course and three chains in the length of the line connecting the survey of the claim with a corner of the public surveys, but the entry may be referred to the Board of Equitable Adjudication. Walter C. Childs, 10 L. D. 178.

25. A notice of application for a mineral patent that fails to connect the claim with the public surveys or a United States mineral monument is insufficient, and an entry allowed on such notice may not be referred to the Board of Equitable Adjudication in the presence of a protest of persons alleging adverse claims, but republication of notice will be required. Nil Desperandum Placer, 10 L. D. 198.

26. The legality of posting of notice of application for patent, upon which entry has been allowed, cannot be questioned in an action at law. Aurora Hill M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581.

27. One making application for patent to mineral land is required by law to post on the premises a diagram and notice of such application. The courts will presume such notice given, which is of itself a warning to all that the parties are about applying for patent—seeking to obtain title. St. Louis Sm. & Refining Co. v. Green (Colorado), 10 C. L. O. 110.

28. Issuance of a mineral patent "is *prima facie* evidence that a discovery of mineral was made; that the land was properly located as mineral land; that the application for patent, the notices given by the defendants (applicants) and all other steps required by the law had been regularly taken." N. P. R. R. Co. v. Cannon, 7 U. S. App. 507.

29. Where a mineral patent issues based on an erroneous survey, a new patent in lieu thereof may not be issued without new notice by publication and posting, based on a correct survey, where the original survey is so erroneous as not to cover any portion of the claim. If such patentee refuses to surrender the erroneous patent, and to reconvey the land covered thereby, suit to vacate the patent will be recommended by the Land Department. United States v. Rumsey, 22 L. D. 101.

30. Where, on a contest between a mill site claimant and a lode claimant, the judgment of the General Land Office was that the land in conflict is non-mineral in character, and that the lode claimant must give new notice of application for patent, the lode claimant may not allow said decision to become final, and then, by moving the reference of his entry to the Board of Equitable Adjudication, attempt indirectly to evade that portion of the decision adverse to him, while claiming its finality as against the contestant. Oscar Waller, 22 L. D. 318.

APPLICATION.

I. THE STATUTES.
II. REGULATIONS.
III. DECISIONS.

I. THE STATUTES.

(See sec. 2325, U. S. Rev. Stat., p. 137.)

Act of Jan. 22, 1880, sec. 1.

AN ACT to amend sections twenty-three hundred and twenty-four and twenty-three hundred and twenty-five of the Revised Statutes of the United States concerning mineral lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "*Provided*, That where the claimant for a patent is not a resident of or within the land-district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: *And provided*, That this section shall apply to all applications now pending for patents to mineral lands." (21 Stat. 61.)

II. REGULATIONS.

31. Accompanying the field notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining-district, State, or Territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.

74. As a condition for the making of application for patent according to section 2325, there must be a preliminary showing of work

or expenditure upon each location, either by showing the full amount sufficient to the maintenance of possession under section 2324 for the pending year; or, if there has been failure, it should be shown that work has been resumed so as to prevent relocation by adverse parties after abandonment.

The "pending year" means the calendar year in which application is made, and has no reference to a showing of work at date of the final entry.

75. This preliminary showing may, where the matter is unquestioned, consist of the affidavit of two or more witnesses familiar with the facts.

93. A party who is not an applicant for patent under section 2325, Revised Statutes, or the assignee of such applicant, is not entitled to make entry under said section, and in no case will the name of such party be inserted in the certificate of entry. This regulation has no reference to proceedings under section 2326.

104. The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, Rev. Stat., paragraph 9.)

105. All fees or charges under this law may be paid in United States currency.

III. Decisions.

1. An application must be sworn to by the party making it. Jefferson M. Co. v. Pennsylvania M. Co., 1 C. L. O. 66.

2. An application for a mining claim signed by one joint owner for himself and co-claimants should be recognized as the application of all the owners; the acts of the agent are the acts of the claimants themselves. Ayers v. Daly, 3 C. L. O. 196.

3. Claimants must verify their coal declaratory statements and applications by their oaths, and they cannot delegate that duty. They can act by an agent only in the matter of filing said papers and making the necessary payments. White Oaks Improvement Co., 13 C. L. O. 159.

4. An application for a mining claim, signed by one joint owner for himself and co-claimants, should be recognized as the application of all the owners; the acts of the attorneys are the acts of the claimants themselves. Ayers v. Daly, 3 C. L. O. 196.

5. Applications may be made by residents temporarily absent from the land district through an agent. Topsey Mine, 7 C. L. O. 20.

6. An applicant who resides in the land district, if within the district, must make affidavits. Secretary, March 2, 1880.

7. The affidavits required of an applicant for a mineral patent may not, under the act of January 22, 1880, be made by an agent if the applicant is a resident of or at date of making proof within the land district, even if the agent is the only one personally cognizant of the facts constituting compliance with the law. Rico Lode, 8 L. D. 223.

8. An application for a mineral patent may embrace any number of contiguous locations owned in common. St. Louis Smelting Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Good Return M. Co., 4 L. D. 221; Samuel E. Rogers, 4 L. D. 284; Champion M. Co., 4 L. D. 362; S. F. Mackie, 5 L. D. 199; William De Witt, 9 C. L. O. 34. (The above decisions overrule the Circular of June 8, 1883, and Lake Quicksilver M. Co., 2 C. L. O. 130.) Circular of March 24, 1887, under Good Return decision, 8 L. D. 505.

9. An applicant for a mineral patent must show the land claimed to contain valuable mineral and that the improvements upon the claim tend to its development. John Downs, 7 L. D. 71.

10. "The last position of the court below, that the owner of contiguous locations who seeks a patent must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been performed, is as untenable as the rulings already considered." St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

11. An entry based upon an application for patent to two contiguous claims not owned in common will be canceled as to one of said claims if the claimants agree as to which claim shall be eliminated; otherwise the entry will be canceled in its entirety. Com'r to Helena Office, Dec. 23, 1891, Forest and Louis G. Lodes.

12. The area which may be applied for as a placer is unlimited if the separate locations are legal and contiguous, and the entire title is in the applicant. Com'r to Smith Bros., Sept. 20, 1879, 7 C. L. O. 4.

13. Where several locations are embraced in one application for patent, and an expenditure of $500 is not shown on each claim, it must be made to appear that $500 has been

spent for the joint benefit of the various locations. Andromeda Lode, 13 L. D. 146.

14. A person or association may purchase as many placer locations as the local law permits and embrace them all in one claim. Com'r to H. F. Page, Nov. 21, 1874, 1 C. L. O. 134.

15. Where separate application and entries are made for the several locations surveyed as one claim, the claimant may file a new application for the consolidated claim and make a new entry therefor, *nunc pro tunc*. F. A. Williams, 15 L. D. 532.

16. Possessory title of an applicant for a mineral patent must be clearly shown. One claiming under a certificate of sheriff's sale of a mining claim until the execution of a sheriff's deed therefor does not hold legal title. Departmental decisions of April 24, 1896, in case of I. X. L. and Opir Quartz Mine and Mill Site.

17. Where an application for patent is filed, and mineral entry made by a mortgagee, the entry may be allowed to stand if he subsequently acquires legal title to the claim. White Extension West Lode, 22 L. D. 677.

18. Contracts for conveyance to the applicant, made before application, are sufficient basis for the application if full title was acquired before patent issued. Prince of Wales Lode, 2 C. L. O. 2.

19. An applicant for a mineral patent must clearly show possessory title to the claim applied for. Montana Co., 6 L. D. 261.

20. A mineral patent will issue only to a qualified applicant for patent or to one claiming under him by transfer before entry. J. C. Baker Fraction Placer, 23 L. D. 112.

21. Where a locator of a mining claim conveys the same with an agreement that he shall secure patent therefor in his own name, he may be allowed to make application and entry for the claim, notwithstanding his lack of title. A. P. Smith, 3 L. D. 340.

22. Where the office of the custodian of the records from which abstracts of title must be made is far removed from the Land Office, the abstract of title to the mining claim should not be required to be brought down to date of filing of application for patent. Daniel Cameron, 4 L. D. 515.

23. Where the possessory title to a mining claim becomes vested (either by location or transfer) in one who dies before applying for a patent, if application and entry are made by the heirs, devisees, executor or administrator, patent will be issued in the name of the decedent, the Land Department refusing to pass upon the title of those claiming under the decedent. Com'r to Helena Land Office, March 25, 1896, *In re* Broadwater Placer.

24. With an application for patent a complete abstract of title is required. Kempton Mine, 1 C. L. O. 178.

25. An application by one not the owner allowed because privity of interest was shown. A. P. Smith, 3 L. D. 340. *Contra*, Montana Co., 6 L. D. 261.

26. The objection that applicants did not have title at the date of application is insufficient unless clearly shown. Prince of Wales Lode, 2 C. L. O. 2.

27. An applicant who, as co-owner, relocated a mine in his own name as single proprietor, is not obliged to show title back of such relocation. Gold Dirt Lode, 10 C. L. O. 119.

28. Where an applicant for a mine claims the title through a deed signed by a party as executor of a deceased party, certified copy of letters testamentary with copy of will should be filed. N. E. Extension Yosemite Lode, 3 C. L. O. 18.

29. "A party making application for patent need not necessarily show that he owns the entire claim but in case he shows that he has a substantial interest, and his application is not adversed, he will be allowed to make entry and receive patent." Com'r to Keat and Fogg, July 11, 1892.

30. Where an application for patent is made by a trustee the citizenship of the beneficiary must be shown. Circular, July 6, 1883, 2 L. D. 725; Capricorn Placer, 10 L. D. 641.

31. An application based on title acquired through aliens will be rejected. Com'r to Roseburg Office, April 24, 1876.

32. Locators and intermediate owners other than applicants will not be presumed aliens in the absence of allegation or objection prior to issuance of patent. Wandering Boy Lode, 2 C. L. O. 2.

33. In application for patent, proof of citizenship is not required of the original locators or intermediate owners, but of the applicant or adverse claimant only. Cash Lode, 1 C. L. O. 98.

34. An applicant for patent as trustee for creditors is not relieved from the requirement of showing the citizenship of the beneficiaries by reason of the large number of creditors. Com'r to Chas. W. O'Neil, Dec. 7, 1891.

35. Where a second application is allowed for land embraced in a prior application, by reason of the fact that the survey showed no conflict, and the second applicant, being misled by the action of the land office, failed to adverse the first application, such second application may be treated as an adverse claim (and the second applicant in this case was allowed thirty days from the decision within which to begin suit). Hall v. Street, 3 L. D. 40.

36. The filing of an application for a mineral patent segregates the land applied for and bars another application for the land. Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704; Gunnison Crystal M. Co., 2 L. D. 722; Hall v. Street, 3 L. D. 40; Rocky Lode, 15 L. D. 571.

37. Mere application for patent to a mining claim, not followed by notice thereof, is not a segregation of the land, and confers no right upon which others are bound to wait indefinitely. Snow Flake Lode, 4 L. D. 30.

38. Mineral application, followed by notice, segregates the land applied for, and abandonment thereof must be shown, and the application canceled, before a second application is received for the land. Andrew J. Gibson (on review), 21 L. D. 219.

39. One desiring to apply for a mineral patent for land covered by an existing mineral application may secure its cancellation by proving abandonment of the claim applied for, at a hearing to which the applicant is a party. Moylan C. Fox, 2 L. D. 766.

40. A mineral application tendered at the local land office, but not filed because of the temporary absence of the register, operates to segregate the land covered thereby and bars the subsequent filing of an application for the same land by another, pending action by the register. Rice v. Redding, 11 L. D. 218.

41. An application for mining patent duly filed in the local office should be treated as *prima facie* evidence of an appropriation of the premises described; but where an entry was prematurely allowed for disputed ground, while suit was pending, and the entryman subsequently recovered a judgment for the ground, the question regarding the regularity of the entry is one between the government and the entryman only. Gunnison Crystal M. Co., 2 L. D. 722.

42. An application under the mining acts takes the premises out of the operation of the local laws. Daney G. & S. M. Co. v. Sapphire S. M. Co., 2 C. L. O. 66.

43. An application for patent is such a segregation as will except land from a railroad grant. J. G. Sanders v. N. P. R. R. Co., Com'r to Helena Office, April 19, 1892; and in J. W. Sanders v. N. P. R. R. Co., even if afterward canceled because of non-mineral character of ground. Com'r to Helena Office, Sept., 1893.

44. One who has filed an application for a mining patent, but who has given no notice thereof, is bound to adverse the application of another who makes a subsequent application and gives notice thereof, and the failure so to do is a waiver of his rights. Snow Flake Lode, 4 L. D. 30.

45. Land covered by a mineral application for patent, of which notice has been given, may not be embraced in another application. Rebellion M. Co., 1 L. D. 542; Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704.

46. An applicant who fails to pay the government price or make an entry can only protect his interest against a second applicant by filing an adverse claim. Seaton M. Co. v. Davis, 7 C. L. O. 147.

47. Where two applications conflict, the senior may relinquish the conflict and the junior proceed with the ground in conflict. Marcus Daly, 10 C. L. O. 167.

48. Where a claim has been applied for and subsequently forfeited, a relocator who desires to apply for patent should secure the cancellation of the existing application by the Land Department. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

49. Until an application is set aside by the Land Department, it cannot be considered as having been waived or forfeited. Daney G. & S. M. Co. v. Sapphire S. M. Co., 2 C. L. O. 66.

50. A survey under the mining act does not withdraw the land from sale unless followed by an application. William L. Campbell, 4 C. L. O. 35.

51. A mineral application will not be received for a mill site under the second clause of section 2337, United States Revised Statutes, unless it appears that there is situate upon the tract applied for a quartz-mill or reduction works capable of being used independently of works on an adjoining mill site; *i. e.*, two mill sites may not be applied for by placing one mill or reduction works upon the line between them. Hecla Cons. M. Co., 14 L. D. 11.

52. Mineral application for a mill site on which there is no mill, and which is not used or occupied in connection with a lode which has been applied for, is invalid. Hamburg M. Co. v. Stephenson, 17 Nev. 449; 30 Pac. Rep. 1088.

53. A tract of land claimed and used for mining or milling purposes in connection with a patented lode claim may be entered under the first clause of section 2337, United States Revised Statutes, viz.: the mill site need not be applied for and entered with the lode claim. Eclipse Mill Site, 23 L. D. 496; Departmental decision of May 23, 1896, *In re* Idaho Mill Site.

54. Where a lode claim and a mill site appurtenant thereto are embraced in one survey and in one application for patent, the survey of the mill site need not be connected with a corner of the public surveys or a United States mineral monument, if connected with the survey of the lode claim, and in such a case it is not incumbent upon the claimant to show an expenditure of $500 upon the mill site, its use or occupancy for mining or milling purposes in connection with the lode claim being sufficient to entitle claimant to ask for a patent therefor. Alta Mill Site, 8 L. D. 195; Com'r to Prescott Land Office, Sept. 12, 1895, *In re* Genung Spring and Mill Site.

55. The owner of a mill site can protect his claim, when embraced in another's application, only by proceedings under section 2326, United States Revised Statutes. Warren Mill Site v. Copper Prince Lode, 1 L. D. 555.

56. In case a mill site for which application is made is alleged to be mineral land, a hearing may be ordered. Theo. H. Becker, 5 C. L. O. 51.

57. A mineral claimant may temporarily exclude part of his claim from his application to purchase an entry without waiving his right thereto, if such exclusion be caused by the assertion of adverse rights. Aspen Cons. M. Co., 23 L. D. 8. (Citing Branagan v. Dulaney, 2 L. D. 744.)

58. An applicant may abandon that part of his location adversely claimed, and after survey receive a patent for the part not in controversy. Fairmount G. & S. M. Co., 1 C. L. O. 82.

59. The application for patent for a mining claim and the exclusion from the entry thereof of a part of the claim renders the excluded portion vacant public land, viz., such exclusion operates *pro tanto* as an abandonment. Adams Lode, 16 L. D. 233. *Contra*, Aspen Cons. M. Co., 23 L. D. 8.

60. The exclusion from application for patent of that portion of the claim containing the discovery renders it incumbent on the applicant to show a discovery of mineral upon claimed ground. Cayuga Lode, 5 L. D. 703; Silver Jennie Lode, 7 L. D. 6.

61. An applicant for a mineral patent may make entry of his claim exclusive of land covered by an adverse claim and take patent for the land not in conflict, without waiving his possessory right to the excluded portion. Black Queen Lode v. Excelsior No. 1 Lode, 23 L. D. 343.

62. A. may apply for a patent to a mining claim, exclusive of a portion thereof involved in an adverse suit brought by him against B., a prior applicant, without thereby waiving any right to the excluded portion, and if, on such suit, the land is awarded to A., he may then make entry of his entire claim, based on his application as to one part, and on his judgment as to the other. Rebellion M. Co., 1 L. D. 542.

63. If an adverse claim is filed against an application for patent for two contiguous claims, directed against only one of said claims, the applicant may make entry of the claim not covered by the adverse. Com'r to Marysville Office, July 10, 1896.

64. Defendant at time of filing application for patent was an alien; his application was adversed, and on the day of trial defendant was naturalized. *Held*, that his act of naturalization could not retroact to his purchase or acquisition of possessory right to a mining claim upon the public domain. Wulff v. Manuel, 9 Mont. 279; 23 Pac. Rep. 723. (Reversed in 152 U. S. 505.)

65. If an application for patent is adversed, the applicant is at liberty to litigate with the adverse claimant, or relinquish the ground in conflict and take a patent for the remainder, or dismiss his application for patent and rely upon his possessory title. Branagan v. Dulaney, 2 L. D. 744.

66. A. applied for patent. B. applied for a conflicting claim and A. adversed. *Held*, that on relinquishment by B. of conflict with claim of A. as shown by adverse and as applied for, B. may make entry without regard to the adverse of A. Com'r to Glenwood Springs, April 23, 1896, *In re* Homestake Lode.

67. The exclusion by an applicant for patent of conflict with a conflicting claim is no recognition of a superior right of the owner of the conflicting claim nor of its validity. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

68. Where an applicant relinquishes the portion of premises embraced in an adverse claim, further proceedings before the department will not be stayed. Antelope Lode, 2 C. L. O. 2.

69. An applicant for a lode patent by excluding conflict with a mill site admits the non-mineral character of the land embraced therein, and if the assumed course of the lode is intersected by such mill site, the lode claimant may retain in his application only one of the non-contiguous parts of his lode claim. Michael Howard, 15 L. D. 504.

70. Where, in the published notice of application for patent, the applicant excludes, "without waiver of rights," the ground in conflict with another claim, he cannot thereafter embrace said conflict in his entry without giving due notice of application for said conflict in the usual manner. Departmental decision of June 18, 1896, *In re* Canuck Lode.

71. A formal exclusion from an application for patent of conflict with another claim will not have any effect if it is shown that, as a matter of fact, no such conflict exists. Steamboat Lode, 13 L. D. 163.

72. Patent cannot be issued based upon a discovery made after application for patent. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404. See S. C., 5 Mont. 600; 6 Pac. Rep. 66.

73. A mining applicant having a discovery shaft within the public land excepted from a patented lode claim cannot make a valid location with a part of his claim non-contiguous and separated by land held and owned by others by virtue of a patent for a parallel lode. Col. Hall Lode, 2 L. D. 786.

74. After applying for patent and giving due notice thereof claimant need not maintain boundary stakes of his location. Byrne v. Slauson, 20 L. D. 43.

75. A protestant against a mining application has no right to appeal from the decision of the Commissioner of the General Land Office. Boston Quicksilver Mine, 4 C. L. O. 84.

76. A protest alleging non-compliance with law on the part of an applicant for a mineral patent must be sufficient to overcome record evidence of compliance with the law, in order to warrant the ordering of a hearing. Whitman v. Haltenhoff, 19 L. D. 245.

77. A protestant against an application under the mining act has no right of appeal from the decision of the Commissioner of the General Land Office. Cerro Bonito Quicksilver Mines, 4 C. L. O. 8.

78. Where parties appear as friends of the court, protesting against an application for patent, the law should be more liberally construed in favor of the applicant than in case of an adverse claim. 420 M. Co. v. Bullion M. Co., 2 C. L. O. 5.

79. A miner should be recognized as entitled to appeal who alleges a fact which, if sustained, will vitiate the proceedings so far had, and leave the land open to a new application. Neils Larson, 9 C. L. O. 111.

80. Where adverse proceedings are pending against an application for patent, the adverse claimant is not required to adverse a second application for the same land, filed by the same applicant. Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; 114 U. S. 576.

81. Application for patent having been filed, the applicant need not adverse a subsequent applicant. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292; Rose v. Richmond M. Co., 114 U. S. 576; 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; Crown Point Lode, Sickel's Min. Dec. 116, 243–275.

82. An adverse claimant who has begun suits on his adverse claims may not file an application for patent for his entire claim and thereby compel the first applicant to adverse such second application; and if such second

application has been filed it will be canceled as to conflict with the first application, even if adverse suit has been instituted against it by the first applicant. Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704.

83. One who has made an application for patent (and given notice thereof) is not required to adverse a subsequent application for a conflicting claim. Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; 114 U. S. 576; Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

84. A prior patentee need not adverse a subsequent application. Mantle v. Noyes, 5 Mont. 274; 5 Pac. Rep. 856; 127 U. S. 348.

85. An application for patent will not be dismissed by the Land Office during pendency of suit based upon an adverse claim. Iron Silver M. Co. v. Mike & Starr M. Co., 6 L. D. 533; Solitaire M. & M. Co. v. Sigafus, 10 L. D. 270.

86. Proceedings may not be taken against a mineral application on a protest, during the pendency of adverse suits against the application. Swaim v. Craven, 12 L. D. 294. [NOTE.—In this case, adverse suits were instituted by lode claimants against a placer application.]

87. During the pendency of a suit based upon an adverse claim against a mineral application, an amended survey of the claim applied for will not be ordered. Com'r to Surveyor General at Denver, Colo., June 26, 1896, *In re* Mollie C. Lode.

88. Where an adverse claim is filed against an application for patent, the applicant may (1) suspend proceedings before the Land Department and litigate with the adverse claimant, (2) relinquish the ground in the conflict from his application (litigating therefor) and take patent for the remainder of his claim, or (3) dismiss his application for patent in its entirety and continue to claim under his possessory title. Branagan v. Dulaney, 2 L. D. 744.

89. Where suit has been commenced on an adverse mining claim, the local officers should not receive from the adverse claimant an application for the ground in conflict. Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704.

90. A co-owner need not protect his rights by adverse if application for patent is made in their own names by the other co-owners; but, if patent issues to them, they will be declared constructive trustees for the owner whose name is omitted from the application. Brundy v. Mayfield, 15 Mont. 201; 38 Pac. Rep. 1067; Turner v. Sawyer, 150 U. S. 578; Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816.

91. Where an applicant bases his right to a patent on a relocation, in the making of which he acted as a constructive trustee for the benefit of co-owners according to their respective interests in the original location, such co-owners are not obliged to adverse the application, but may have the applicant declared trustee. Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816.

92. Where a claim is sold on execution after application for patent has been made therefor, and notice given thereof, the vendee merely takes a right to make entry of the claim if he chooses so to do, and if he allows the applicant to make entry of the claim he has no legal remedy against the entryman, who, by entry, acquired a new and further title, which has not been sold to the judgment vendee. Hamilton v. Southern Nevada M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314.

93. Co-owners must protect their rights by an adverse if application for patent is made by one of them. Mattingly v. Lewisohn, 8 Mont. 259; 19 Pac. Rep. 810; Grampian Lode, 1 L. D. 544; Monitor Lode, 18 L. D. 358; Gold Dirt Lode, 10 C. L. O. 119.

94. Where two co-owners of a mining claim file an adverse against an application for patent, and institute separate suits thereon, in different courts, the Land Department will not allow entry upon the application inclusive of the conflict, during the pendency of either of said suits. Black Queen Lode v. Excelsior No. 1 Lode, 22 L. D. 343.

95. Where the evidence submitted by an applicant for a placer patent shows the land applied for to be placer mining land, the character of the land cannot be questioned by one asserting an adverse claim who has not proceeded as directed by section 2326, United States Revised Statutes. Dahl v. Raunheim, 132 U. S. 260.

96. A placer claimant may file an adverse against the application for patent to a lode claim conflicting with the placer claim. Bennett v. Harkrader, 158 U. S. 441.

97. A party not in interest, but standing in relation of *amicus curiæ*, cannot appeal from any decision rendered. O. D. Lambard, 3 C. L. O. 194.

98. Failure of adverse claimants to proceed in accordance with the provisions of sections 2325 and 2326 of the United States Revised Statutes gives operation to the rule that such adverse claims have been "adjudicated in favor of the applicant." Petit v. Buffalo G. & S. M. Co., 9 L. D. 563.

99. A stipulation between the applicant and a party claiming adversely that such opposing party may file an adverse claim within twenty days after the period of publication is void. Morrison v. Lincoln M. Co., 6 C. L. O. 105.

100. One who fails to adverse an application for patent is thereafter estopped from setting up any legal or equitable title to the land applied for. Wight v. Tabor 2 L. D. 738.

101. "If no adverse claim is filed during the required period of publication, it is assumed that the applicant is entitled to patent, and no agreement of parties can control this statutory provision. If either party claims a non-fulfillment of such agreement by the other, the remedy must be found in the courts, and not before your office or this Department." Gustavus Hagland, 1 L. D. 591. (Followed in Independence Lode, 9 L. D. 571.)

102. Failure of a prior locator to adverse the application for patent to a junior conflicting location is a waiver of priority and of right to object to issuance of such patent. Whitman v. Haltenhoff, 19 L. D. 245.

103. Failure to adverse a mineral application for patent is a waiver of all claims to the ground adverse to those of the applicant, and the fact that such adverse claims are based on the same locations as those of the applicant does not vary the rule. Nichols v. Becker, 11 L. D. 8.

104. Adverse rights must be protected in the manner prescribed by section 2326, United States Revised Statutes, or be held to be waived, in absence of fraudulent concealment by applicant. Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77. (Reaffirmed, 13 Colo. 174; 22 Pac. Rep. 436.)

105. Any rights adverse to a mineral application must be protected by an adverse under section 2326, United States Revised Statutes. Omaha & Grant Sm. & Red. Co. v. Tabor, 13 Colo. 41; 21 Pac. Rep. 925.

106. Any state of facts which shows that the person alleging the same has a better right than the applicant, is the proper subject matter of an adverse claim. Mono M. Co. v. Magnolia E. & W. Co., 2 C. L. O. 68.

107. A tunnel claimant has no cause for adversing the application of a lode claimant who has made a discovery outside of the line of the tunnel, and whose location lies across the line of the tunnel, unless the lode has been discovered in the tunnel. Hope M. Co. v. Brown, 7 Mont. 550; 19 Pac. Rep. 218. (Overruled, S. C., 11 Mont. 370; 28 Pac. Rep. 732, wherein it is held that patent proceedings by the lode claimant will be suspended until development of the lode in the tunnel or abandonment of the tunnel right, and (*semble*) the lode claimant may be restrained from taking ore from the line of tunnel. Refusing to follow Corning Tunnel, etc. Co. v. Pell, 4 Colo. 507; 14 Mor. Min. Rep. 612.)

108. A tunnel claim, under section 2322, United States Revised Statutes, is a mining claim, and must be protected by filing of an adverse claim if application for patent to a claim in conflict therewith is filed. A failure to file an adverse claim is a waiver of all rights under the tunnel claim adverse to those of the applicant for patent. Bodie Tunnel & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584; Broder v. Natoma Water & M. Co., 101 U. S. 274.

109. The owner of a mining claim, holding under possessory title, who has agreed to convey good and sufficient title thereto, the prospective transferee being in possession, has such an interest in the property as entitles him to file an adverse claim against an application for patent to a conflicting claim, and to have a trial thereon. This right cannot be affected by State laws relating to possessory actions. (Reversing the Supreme Court of Montana.) Wolverton v. Nichols, 119 U. S. 485; 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309.

110. The proper land office in which to file an application for patent or an adverse claim is the land office having jurisdiction of the land in question at the time of filing. Frederick A. Williams, 16 C. L. O. 110.

111. An entry allowed upon an application against which an adverse suit is pending will be canceled. Brown v. Bond, 11 L. D. 150.

112. An application to make mineral entry, by a successful adverse claimant, must be accompanied by official plat and field-notes describing the tract awarded him, and by a certificate of the United States Surveyor General of an expenditure of $500 upon the tract sought to be entered. Albert F. Harah, 2 L. D. 706.

113. The General Land Office passes upon the papers of an application and upon the protest of an adverse claimant. Iola Lode, 1 L. D. 539.

114. The allegations by a protestant that the location of a mining claim applied for was invalid because in conflict with the prior location of the protestant is simply the allegation of an adverse claim, which may be tried only in the manner prescribed by section 2326, United States Revised Statutes, in a court of competent jurisdiction. Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584.

115. Where a mineral entry has been allowed after due notice of application for patent, a protestant who admits the sufficiency of such notice appears solely as *amicus curiæ*, without right of appeal from a decision of the General Land Office dismissing his protest. Bright v. Elkhorn M. Co., 8 L. D. 122.

116. A protest against a mineral application, filed after the period of publication, will not be considered by the Department on appeal, unless it is shown that the protestant has an interest in the ground involved, and that the law has not been complied with by the applicant. Parsons v. Ellis, 23 L. D. 69.

117. The grantee of an applicant for patent against whom an adverse suit is pending takes *pentente lite*, even though no notice of *lis pendens* is filed, as publication of notice of application is process to bring all adverse claimants into court. People *ex rel.* Darby v. District Court, 19 Colo. 343.

118. Only the persons making an application and adverse claimants can be parties to an action in court under sections 2325 and 2326, United States Revised Statutes. Mont Blanc Cons. Gravel M. Co. v. De Bour, 61 Cal. 364; 15 Mor. Min. Rep. 286; 9 C. L. O. 205.

119. An adverse claimant who dismisses his suit cannot delay an application by commencing a second suit. Wood v. Hyde, 1 C. L. O. 66.

120. An adverse complaint should allege all material facts as to plaintiff's ownership; that application for patent has been filed by defendant; that suit is based on an adverse claim duly filed, and should show conflict between the claims. Cronin v. Bear Creek G. M. Co., 32 Pac. Rep. 204; Mattingly v. Lewisohn, 8 Mont. 259; 19 Pac. Rep. 310; Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419.

121. An adverse complaint under the Nevada statutes need only set up filing of mineral application by defendant, and adverse ownership by plaintiff. Rose v. Richmond M. Co., 17 Nev. 25; 2 Colo. Law Rep. 7; 27 Pac. Rep. 1105; 114 U. S. 576.

122. Under the Montana statutes, a suit based upon an adverse claim against an application for a mineral patent may be tried either as a suit at law, in which case the facts must be tried by a jury, unless the right is expressly waived, or it may be heard as an equity suit, without a jury, accordingly as the relief asked is legal or equitable. Hammer v. Garfield M. & M. Co., 130 U. S. 291.

123. A conflicting application, filed during publication of a prior application, treated as an adverse claim. Hall v. Street, 3 L. D. 40.

124. The failure of an applicant to comply with local regulations will not justify suit by the United States to vacate the patent issued to him. Such failure should be made the subject of an adverse claim or protest during the pendency of the application. Robert Hawke, 5 L. D. 131.

125. Where the senior survey is the junior application, entry thereof should not be allowed in view of the conflict shown in a junior survey. The claimants under the junior application, but senior survey in this case, are allowed thirty days within which to commence proceedings in court. Hall v. Street, 3 L. D. 40.

126. Where entry has been made for a mining claim, and thereafter an application is erroneously allowed for a conflicting claim, and the entryman of the first claim files an adverse claim against said application and begins suit thereon, all action will be suspended both upon said entry and said application during the pendency of said suit. Little Giant Lode, 22 L. D. 629.

127. A town lot may be the subject of an adverse claim to land embraced within an application for a lode. Papina v. Alderson, 10 C. L. O. 52.

128. Where a mining claim has been sold on execution and thereafter application is filed by the judgment debtor, who gives due notice thereof, the claim of the vendee is adverse to that of the applicant and must be protected by adverse proceedings under section 2326 of the United States Revised Statutes, or be considered waived. Hamilton v. Southern Nevada M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314.

129. Where, prior to application for patent, the owner of a mining claim conveys a part thereof as a town lot, the grantee is not bound to adverse the application, but the patentee takes title subject to a trust in favor of his grantee. Suessenbach v. First Nat. Bank, 5 Dak. 477; 41 N. W. Rep. 662.

130. Town site claimants should protect any rights they may have adverse to that of a mineral applicant by filing an adverse claim and proceeding thereon in court. Thomas Starr, 2 L. D. 759.

131. Application for a mineral patent being made for the land embraced within a prior town site patent, adverse claim should be filed or protest entered on behalf of said town site; and in the absence of such action, suit to set aside the mineral patent thus issued will not be advised. David N. Upton, 4 L. D. 555.

132. As claims located prior to 1872 were for one vein only, an application for a claim in conflict with another need not be adversed by the owner of such other claim to protect his rights, if such claims were located on different lodes. Blake v. Butte S. M. Co., 2 Utah, 54; 9 Mor. Min. Rep. 503.

133. The pendency of a suit commenced by the applicant against the adverse claimant does not excuse compliance with the act of July 26, 1866. 420 M. Co. v. Bullion M. Co., 2 C. L. O. 5.

134. An adverse claimant whose adverse suit has been dismissed will not thereafter be heard to attack the validity of the applicant's title. Kannaugh v. Quartette M. Co., 16 Colo. 341; 27 Pac. Rep. 245.

135. Where suit is commenced after the filing of an application, by a party who subsequently filed an adverse claim in regular form, the application will remain suspended until the case is decided in court or otherwise settled. Shoo Fly Lode v. Gisborn, 1 C. L. O. 135.

136. If a suit to determine the right of possession to a mining claim is pending at the time of publication of notice of application for patent therefor by one of the parties, it is not necessary that the other party should file an adverse claim, but he need only show the pendency of said suit to procure a stay of proceedings before the land office. Northwestern Lode & Mill Site Co., 8 L. D. 437.

137. Under the act of July 26, 1866, suit should be commenced by the party who sets up the adverse claim, except where the adverse claimant is in the evident and open possession of the premises, when the applicant should commence suit. Becker v. Central City Town Site, 2 C. L. O. 98.

138. An application for a lode patent was made by A. B., the owner of a conflicting lode claim, filed an adverse claim and commenced suit thereon, alleging a prior location of the ground in conflict. A. filed an answer, but thereafter amended the survey of his claim by so shortening it as to eliminate from it all conflict with the claim of B., and was allowed to make entry in the land office of the reduced area. He then withdrew his answer, and B., on testimony submitted, secured judgment for the land in controversy. *Held:* (1) That the withdrawal of the answer and abandonment of the application for patent, as to the conflict did not remove the cause from the jurisdiction of the court. (2) That, in view of the first holding, the judgment is conclusive as between A. and B. of the priority of the location of B. Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683. (Reversing 7 U. S. App. 463; 54 Fed. Rep. 284; 9 U. S. App. 613; 61 Fed. Rep. 557; 15 U. S. App. 456.)

139. The locator of a lode claim who fails to adverse an application for a placer claim covering the same, by such failure loses his rights to surface ground in excess of twenty-five feet on each side of the middle of his lode. Shonbar Lode, 3 L. D. 388. (Modified in South Star Lode, 20 L. D. 204.)

140. The owner of a lode claim within a patented placer may file an application for patent, and the placer claimant may protect himself by filing an adverse claim and proceeding under the provision of section 2326, United States Revised Statutes. Robinson v. Roydor, 1 L. D. 564.

141. The owner of a lode alleged to have been known at date of application for pat-

ent to a placer (since patented), covering the lode, should apply for patent in the usual manner and allow the placer patentee to adverse should he desire. Olathe Placer, 4 L. D. 494.

142. One who files no adverse claim will not be allowed to question legality of applicant's title thereafter. Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77. (Affirmed, 13 Colo. 174; 22 Pac. Rep. 436.) Hunt v. Eureka Gulch M. Co., 14 Colo. 451; 24 Pac. Rep. 550; Seymour v. Fisher, 16 Colo. 188: 27 Pac. Rep. 240; Wight v. Dubois, 21 Fed. Rep. 698.

143. Failure to adverse a mineral application is a conclusive waiver of all adverse rights. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Steele v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292; Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240.

144. Failure of first locator to adverse application for patent by second locator is a waiver of priority. Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 9 Mor. Min. Rep. 578.

145. An applicant for patent to a mining claim must, within the sixty days of publication of notice of application, file a certificate of the Surveyor General showing an expenditure of $500 upon the claim, and additional time to make the required expenditure cannot be allowed under the law. White Cloud Copper Mining Co., 22 L. D. 252.

146. An application for a mineral patent will be rejected and canceled upon the filing of a protest against the same, where the applicant failed to comply with the law by filing within the sixty days of publication the certificate of the United States Surveyor General as to statutory expenditure upon the claim. Milton v. Lamb, 22 L. D. 339.

147. Where several contiguous locations held in common are embraced in one application for patent, an expenditure of $500 upon every one of such locations need not be shown if that sum has been expended upon some one or more thereof, for the development of the consolidated claim. Good Return M. Co., 4 L. D. 221; Circular March 24, 1887, 8 L. D. 505; Nichols v. Becker, 11 L. D. 8.

148. If expenditure and improvements are made as a part of a general system of development of several neighboring claims not embraced in one application for patent, it must be shown what part of such expenditures or improvements is exclusively credited to the claim applied for. Nil Desperandum Placer, 10 L. D. 198.

149. At date of filing application for mineral patent the claimant must show either that assessment work has been done for the pending year, or that work has been resumed on the claim. John Kinkaid, 5 L. D. 25.

150. An expenditure of more than $1,500 by the owners of an adjoining mine on the portion of a tunnel running through the premises embraced in an application is an expenditure under the mining law upon the claim applied for. George K. Willard, 4 C. L. O. 67.

151. Failure to perform annual expenditure upon a claim up to date of entry will subject the claim to relocation even after application for patent and publication of notice thereof. McNeil v. Pace, 3 L. D. 267; Sweeney v. Wilson, 10 L. D. 157.

152. After application for patent and publication of notice thereof, and before entry, a claim may be relocated for abandonment, and, if so relocated, the application will be canceled if no adverse claim or suit based on an adverse claim is pending against said application. Continental G. & S. M. Co. v. Gage, 10 L. D. 534.

153. An expenditure of $500 must be made by the applicants or their grantors, in case of a relocated mine, after relocation. Com'r to W. A. Arnold, 1 C. L. O. 179.

154. A mineral application should not be received for land covered by a homestead entry, but upon its tender a hearing should be ordered to determine the character of the land. (In this case the erroneously filed application was allowed to stand pending such a hearing.) Hooper v. Ferguson, 2 L. D. 712.

155. Where land returned as agricultural in character has been embraced in a *prima facie* valid mineral application, the slight presumption raised by the return of the Surveyor General is overcome, and the burden of proof is on one alleging its agricultural character. N. P. R. R. Co. v. Marshall, 17 L. D. 545.

156. A hearing to determine the character of the land covered by a mineral application, and the question of compliance with the law by the applicant, may be ordered by the local

land office on protest filed. Devereux v. Hunter, 11 L. D. 214.

157. Where a mineral entry has been allowed upon a satisfactory showing of the mineral character of the land, a hearing will not be ordered on the protest of an agricultural claimant unless it be alleged that the land was agricultural in character at date of filing of mineral application for patent. Houghton v. McDermott, 15 L. D. 509.

158. The Land Department will not order a hearing to determine the character of land unless an application to enter the same is made. Central Pacific R. R. Co., 8 L. D. 30.

159. Issuance of a mineral patent "is *prima facie* evidence that a discovery of mineral was made; that the land was properly located as mineral land; that the application for patent, the notices given by the defendants (applicants) and all other steps required by the law had been regularly taken." N. P. R. R. Co. v. Cannon, 7 U. S. App. 507; Last Chance M. Co. v. Tyler M. Co., 15 U. S. App. 456.

160. An applicant for a patent to a lode claim in a patented town site may, upon making a proper showing, be allowed a hearing to prove the known existence of the lode at date of the town site entry, with a view to the recommendation by the Land Department of suit to vacate the town site patent as to the conflict. Thomas J. Laney, 9 L. D. 83.

161. "The miner having located his claim, is to be treated as an express licensee of the United States, and independent of a purchase from the government of his mining claim, he has, upon compliance with the terms of the act, a right to appropriate the minerals therein contained. A title in fee by patent is offered him, which he may at his pleasure accept or reject." There is no time prescribed within which he shall apply for a patent. Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

162. The owner of a mining claim need not apply for a patent therefor until he so chooses. Lebanon M. Co. v. Cons. Republican Mtn. M. Co., 6 Colo. 381.

163. An applicant for a mining claim should show compliance with the local and United States laws. Chambers v. Pitts, 3 C. L. O. 162.

164. An investigation may be had as to whether applicant has complied with the law. Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584.

165. Non-contiguous tracts may not be embraced in an application for patent. Com'r to Surveyor General of California, Oct. 28, 1891.

166. To be excepted from a placer patent a lode need not have been located at date of the application for such patent. "It is enough that it be known, and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises," etc. Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394; Sullivan v. Iron Silver M. Co., 143 U. S. 431; Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591; Iron Silver M. Co. v. Reynolds, 124 U. S. 374; Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

167. A lode within the limits of a patented placer claim, to be excepted from the placer patent, must have been *known* to exist at date of the application for the placer patent. Mere *belief* in the existence of the lode is not knowledge thereof. Iron Silver M. Co. v. Reynolds, 124 U. S. 374; S. C., 116 U. S. 687 (first trial); U. S. v. Iron Silver M. Co., 128 U. S. 673.

168. A lode, to be excepted from a placer patent, must have been known to be valuable enough to justify exploitation at date of application for the placer patent. Brownfield v. Bier, 15 Mont. 403; 29 Pac. Rep. 461.

169. The title to all veins or lodes within a placer claim, known to exist at date of the placer application for patent and not included in such application, remains in the United States; and the placer patentee or his grantee have no right to dispossess any one in the peaceable possession of such vein or lode, whether the latter have any title or not. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

170. A lode within a placer claim known at date of application for placer patent is carved out of the placer patent. Dahl v. Raunheim, 132 U. S. 260.

171. To be excepted from an application for placer patent, a lode must have been known to be valuable for mineral at date of

such application. Largey v. Black, 10 L. D. 156.

172. The legal location of a placer mining claim will not prevent the location of lode claims therein by other persons at any time previous to application for patent for the placer. Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 L. D. 95.

173. The formal location of a lode is not necessary to exclude it from a placer patent, the only requisite to such exclusion by operation of law being (1) that it was known to exist at date of application for the placer patent, and (2) that it was not included in such application. Railroad Lode v. Noyes Placer, 9 L. D. 26.

174. A lode known to exist at date of application for a placer patent, "however insignificant in value," is excepted from the placer application. Becker v. Sears, 1 L. D. 577.

175. In assuming to issue patent for a lode claim alleged to have been known at the date of application for a placer patent (since issued) covering the land, the Department will proceed with caution, and will require the known existence of such lode at that date to be clearly shown. Departmental decision of May 18, 1896, *In re* Lucy L. Lode.

176. In the case of a known lode in a placer claim at date of the placer application for patent, and not included in the placer application, the rule which applies to all actions to recover possession of real estate applies, namely, that the plaintiff can only recover on the strength of his own title, and not on the weakness of defendant's title. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

177. Where no vein or lode is known to exist within a placer claim at date of application for patent therefor, the patent for such placer claim shall carry all such veins or lodes within its boundaries which may be afterwards found to exist under its surface. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

178. A lode, to be excepted from a placer entry, must have been known at date of the application for placer patent. War Dance Lode v. Church Placer, 1 L. D. 549.

179. A lode within a placer location belongs to the placer claimant if not known at date of placer application. Montana Copper Co. v. Dahl, 6 Mont. 131; 9 Pac. Rep. 894.

180. A placer applicant will not be allowed to amend his application for patent so as to embrace therein a lode discovered before the filing of such application, as the failure to embrace the same in the placer application in the first instance was, under the law, a conclusive waiver of all claims to the lode. Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 L. D. 95.

181. The discovery, subsequent to application for a placer patent, of veins or lodes within the limits of the placer claim does not affect the rights of the placer applicant. United States v. Iron Silver M. Co., 128 U. S. 673. (Affirming S. C., 24 Fed. Rep. 568.)

182. A patent for a placer claim carries title to all veins or lodes in said claim not known at date of application for placer patent. Maggie Lode, 14 L. D. 655.

183. Proof of the location of a lode claim in a placer at the date of placer application for patent is not proof of the known existence of the lode. Butte & Boston M. Co. v. Sloan, 16 Mont. 97; 40 Pac. Rep. 217.

184. The question of whether or not a lode was known to exist within a placer claim at date of the application for placer patent is always one for an ultimate decision by the courts. After the Land Department has issued a patent for a placer claim, its jurisdiction over the land patented has ceased, and the only way the title of the patentee can be impeached is by proper proceedings in court. Iron Silver M. Co. v. Campbell, 135 U. S. 286. See South Star Lode, 20 L. D. 204.

185. The validity of a placer patent and its extent, as to conflict with a lode alleged to have been known at date of application for the placer patent, are questions that may be determined only by the courts. Pikes Peak Lode, 10 L. D. 200. (Overruled in South Star Lode, 20 L. D. 204.)

186. A judicial award of the right of possession to an adverse placer claimant as against the applicant for patent for a lode claim does not preclude inquiry by the Land Department on an allegation of the lode claimant that the placer claim as subsequently applied for embraces a known lode, where it appears that the question was not tried on the adverse suit; and if such allegation is sustained, the lode claimant may make entry of his lode together with surface ground necessary to the convenient working thereof.

Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 28 L. D. 95.

187. Where application for a placer patent was made and no adverse claim filed by a lode claimant, and subsequently the lode claimant applied for patent and was adversed by the placer applicant, who began suit and then dismissed it, it was held that the placer applicant had abandoned the conflict and that patent for the lode claim need not be confined to twenty-five feet on each side of the middle of the lode. Monroe Lode, 4 L. D. 273.

188. An application for a lode claim in conflict with a patented placer may not be received by the Land Department as long as the placer patent remains outstanding. If the placer patent was issued upon false proof, suit to vacate the same should be brought by the United States. Pikes Peak Lode, 10 L. D. 200. (Overruled by South Star Lode, 20 L. D. 204.)

189. A vein or lode that has never been claimed; that has not been located; that has not been marked out by metes and bounds, and in which there has been no actual development, is not excepted from a placer application and patent. Iron Silver M. Co. v. Sullivan, 5 McCrary, 274.

190. Where it appears to the satisfaction of the Land Department that a lode was known at date of application for placer patent, the lode, with surface ground twenty-five feet on each side, may be patented, notwithstanding the issuance of the placer patent. Shonbar Lode, 1 L. D. 551; 3 L. D. 388. See Pikes Peak Lode, 10 L. D. 200; and South Star Lode, 20 L. D. 204.

191. The entry of a lode claim conflicting with a patented placer may be suspended to allow the lode claimant opportunity to show at a hearing that the lode was known at date of placer application, with the view to the recommendation of suit to vacate the patent for the placer claim. Rebel Lode, 12 L. D. 683. (Modified in South Star Lode, 20 L. D. 204.)

192. Where an application for patent under the lode mining laws is made for land already patented to another under the placer mining laws, the provisions of section 2326, United States Revised Statutes, do not require the placer patentee to adverse the application of the lode claimant, as only those holding mining claims by possessory title are required to proceed under that law. Iron Silver M. Co. v. Campbell, 135 U. S. 286.

193. On a sufficient showing by the applicant for a lode claim situate in a patented placer, a hearing may be ordered to determine whether the lode was known at the date of the placer application, with the view of recommending suit by the United States Attorney General to vacate the placer patent as to the conflict. Pikes Peak Lode, 14 L. D. 47. (Modified by South Star Lode, 20 L. D. 204.)

194. Where an applicant for a lode patent shows the lode to have been known at date of application for a patented placer, with which it conflicts, instead of incurring expense of suit, by the United States, to vacate the placer patent as to the conflict, the Land Department may accept a reconveyance of the land to the United States, which would reinvest the Department with jurisdiction over it. Juniata Lode, 13 L. D. 715.

195. One who locates a lode within a placer claim after publication of notice of placer application acquires no right to it, and (*semble*) he does not acquire any right if the location is made after placer application. Montana Copper Co. v. Dahl, 6 Mont. 131; 9 Pac. Rep. 894.

196. An applicant for a lode claim within a patented placer must show affirmatively the existence of such mine and its true location, and prove his possessory right and the value of work performed. Moyer v. Mike & Starr G. & S. M. Co., 10 C. L. O. 150.

197. A lode claimant who fails to adverse the application for patent to a placer claim covering his location is barred from thereafter claiming more than twenty-five feet on each side of his lode. Shonbar Lode, 1 L. D. 551; 3 L. D. 388. See South Star Lode, 20 L. D. 204.

198. Section 2322 of the United States Revised Statutes applies only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for patent for a placer claim must include them in his application or he will be deemed to have declared that he had no right to them. Sullivan v. Iron Silver M. Co., 143 U. S. 431; S. C., 109 U. S. 550.

199. The limitation of the width of a lode claim within a placer, prescribed by section

2333 of the United States Revised Statutes, has no application to a case where a lode was covered by a valid location of the full legal extent prior to the application for placer patent, but the whole lode claim is excepted from the placer patent. Pikes Peak Lode, 10 L. D. 200.

200. Application for placer patent is rejected because it is an attempt to secure land valuable for town site purposes and for the veins supposed to be therein. A. D. Searl Placer, 12 C. L. O. 310.

201. Where a patent is sought not for a placer claim, but for a water right, such application will be denied. Robert S. Hale, 3 L. D. 536.

202. Applications should be received at the local land office in the order of time they are offered for filing, not according to dates on which the surveys are approved. Big Flat Gravel M. Co., 1 L. D. 562.

203. The location, application for a mining patent and final survey should agree in describing the same premises. Wandering Boy Lode, 2 C. L. O. 2.

204. The fact that a mining survey conflicts with a prior survey does not prevent the applicant from including the conflicting area in his application. James H. Nolan, 9 C. L. O. 230.

205. The final survey and patent must follow the application, under the mining law of 1866. Prince of Wales Lode v. Highland Chief Lode, 2 C. L. O. 2.

206. An applicant may contract with any United States Deputy Mineral Surveyor for the field work in making the necessary survey. The office work must be done by the Surveyor General. Geo. B. Foote, 2 L. D. 773.

207. An examination of a placer claim and report thereon by a United States Deputy Mineral Surveyor under circular of September 23, 1882, at the expense of the applicant for patent is not required when the claim is taken by legal subdivisions. Rosina T. Gerhauser, 7 L. D. 390.

208. An applicant is not bound to note conflicts with unofficial surveys on the plat or in the field-notes. Wisconsin M. Co. v. Cooper, 10 C. L. O. 69.

209. The Register may exercise an official discretion in the designation of a paper for the publication of notice of a mineral application, and if the one published nearest the claim will not give publicity to the notice, another paper, in which the publication will effect the object of the law, may be designated. Tomay v. Stewart, 1 L. D. 570; Erie Lode v. Cameron Lode, 10 L. D. 655.

210. When the Register designates the daily issue of a newspaper for publication of a notice of a mining application, it should not be changed to the weekly edition. Charles W. Cannon, 3 C. L. O. 18.

211. In designating a newspaper for the publication of notice of a mineral application, the Register is not required to recognize the difference in the distance from the claim, between two papers published in the same city or town. Condon v. Mammoth M. Co., 15 L. D. 330.

212. Publication of notice of application for a mineral patent is process which brings all adverse claimants into court, and the grantee of an applicant for patent, against whose application an adverse suit is pending, takes *pendente lite* even though no notice of *lis pendens* is filed. People *ex rel.* Darby v. District Court, 19 Colo. 343.

213. The legality of posting of notice of application for patent, upon which entry has been allowed, cannot be questioned in an action at law. Aurora Hill M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581.

214. An adverse claimant is not barred from asserting his claim by the allowance of entry without legal notice of application for patent; and where he sets up such an allegation of non-compliance with law in a protest, he has such an interest as entitles him to appeal from the action of the General Land Office dismissing his protest. Bright v. Elkhorn M. Co., 8 L. D. 122.

215. A notice of application for a mineral patent, that fails to connect the claim with the public surveys or a United States mineral monument, is insufficient, and the entry allowed on such notice may not be referred to the Board of Equitable Adjudication, in the presence of the protest of persons alleging adverse claims, but republication of notice will be required. Nil Desperandum Placer, 10 L. D. 198.

216. The published notice of application for patent must appear in all copies of every issue of the paper, and if it does not, repub-

lication will be required. American Flag Lode, 6 L. D. 320.

217. Though publication of notice of application for a mineral patent in a weekly paper must continue sixty-three days, it does not follow that notice by posting must cover that time. The requirement is that there must be sixty days of contemporaneous publication and posting. Great Western Lode, 5 L. D. 510.

218. Where the Register of the Land Office was suspended, and the Receiver was directed to take charge of the office, and received a mineral application, and directed publication of notice thereof, his acts were those of an officer *de facto*, acting *colore officii*, and will be held valid. Dean Richmond Lode, 1 L. D. 545.

219. The application is rejected because the publication of notice was without the knowledge of the Register; the notice was not made in the newspaper nearest the claim; the record title was defective; previous application had been made and withdrawn pending a suit commenced by the adverse claimant. Brown v. Lewis, 1 C. L. O. 50.

220. Publication of notice of application for a mineral patent under direction of the Receiver of the Land Office, during a vacancy in the office of Register, is the act of a *de facto* officer and is not invalid, and failure to adverse such application during such publication is a waiver of adverse right. Jeffords v. Hine, 11 Pac. Rep. 351; 15 Mor. Min. Rep. 575.

221. Notice of application for a mineral patent must be posted during the period of publication in the local land office of the district wherein the claim is situate, and if during such period the boundaries of land districts are changed, the notice must be changed, if necessary, to comply with the rule; otherwise republication and new posting will be required. Frederick A. Williams, 17 L. D. 282.

222. A published notice of application for a mineral patent is insufficient if it fails to give the names of adjoining or neighboring claims. Gowdy v. Kismet Gold Mining Co., 22 L. D. 624.

223. An applicant for patent under the Statute of Limitations must give notice thereof by publication and posting as in other cases. Com'r to Smith Bros., Sept. 20, 1879, 7 C. L. O. 4.

224. Where notice of application for patent was not published for the required period, and the General Land Office ordered republication on that account, without questioning the sufficiency of the notice, and the same notice is thereupon published for the proper period, republication should not again be required for a defect in said notice. Mimbres M. Co., 8 L. D. 457.

225. Where, by error in the survey of a mining claim, the line connecting the claim was so erroneous as to place the claim about half a mile from its true position, it was held that the mineral entry should be referred to the Board of Equitable Adjudication without requiring republication of notice of application. Buena Vista Lode, 6 L. D. 646; Veta Grande Lode, 6 L. D. 718.

226. Notice of application for a mineral patent should be published in the paper which will give to it greatest publicity in the vicinity, even though such paper may not be the paper nearest the claim. Bretell v. Swift, 17 L. D. 558. (Modifying Bretell v. Swift, 16 L. D. 178.)

227. Republication of notice of application for patent will be required where the published notice failed to fix the *locus* of the claim by a line connecting the same with a corner of the public survey or a United States mineral monument. Emperor Wilhelm Lode, 5 L. D. 685; Tennessee Lode, 7 L. D. 393.

228. One making application is required by law to put on the premises notice thereof. The courts will presume such notice given, which notice is of itself a warning to all that the parties are about applying for a patent—seeking to obtain title. St. Louis Sm. Co. v. Green, 10 C. L. O. 110.

229. Notice of application for a mineral patent must give the course and length of the line connecting the claim with the corner of the public surveys or with a mineral monument. It is not sufficient to connect the claim with a corner of the survey of an unpatented mining claim. Emperor Wilhelm Lode, 5 L. D. 685.

230. To bar the rights of adverse claimants, notice of application must be given for sixty days concurrently, by publication, posting on the claim, and in the land office. Tilden v. Intervenor M. Co., 1 L. D. 572.

231. Published notices in mining cases must be numbered to correspond with the

application for patent. Com'r to Central City Office, May 7, 1876, 2 C. L. O. 180.

232. The published notice of an application for a mineral patent is sufficiently definite as to showing the *locus* of the claim if it connects the same with the corner of a patented town site, which is also the corner of a patented placer, both of which are connected in their respective surveys to a United States mineral monument. (By instructions dated March 15, 1892, 14 L. D. 294, the Secretary holds that this decision will not be regarded as a precedent.) Eugene McCarthy, 14 L. D. 105.

233. The plat and notice of application for patent for a mining claim may be posted upon ground excluded from the application if in a conspicuous place. Hughes v. Gilbert, 2 L. D. 756.

234. The plat posted on the claim as required by the statute must be a copy of the plat filed with the application. Kempton Mine, 1 C. L. O. 178.

235. Where an entry is defective in that proper posting of notice of application and plat upon the claim is not shown, the claimant should be allowed to give new notice by publication and posting. Cornell Lode, 6 L. D. 717.

236. An open shaft house is a "conspicuous place" upon a claim for posting of notice of application for patent. Louisville Lode, 1 L. D. 548; Gowdy v. Kismet G. M. Co., 22 L. D. 624.

237. Where a mineral entry is allowed, and it is shown at a hearing that the plat and the notice of application for patent were hidden upon the claim instead of being posted in a conspicuous place thereon, the entry will be canceled without prejudice to claimant's rights to begin proceedings *de novo* to acquire patent. Pratt v. Avery, 7 L. D. 554.

238. A newspaper which changes figures to words so as to lengthen a notice of application for a mineral patent and so increase the cost of publication is not a reputable paper, and a newspaper which does so will not be designated for the publication of such notices. Charles W. Steele, 3 L. D. 115.

239. Republication of notice of application for patent must be accompanied by posting of notice in the local land office and of notice and plat upon the claim, as in the first instance, with the same rights to adverse claimants. American Flag Lode, 6 L. D. 320.

240. Proof of posting of notice of application for patent in the local land office should be furnished by the register, but if not furnished by him the claimant may submit evidence upon the point. Mimbres M. Co., 8 L. D. 457.

241. Notice of application for patent should be posted on both a lode and a mill site covered by the same application, but failure to post on the mill site may be waived where such failure was caused by inadvertence and extensive improvements have been placed thereon. Bailey and Grand View M. & Sm. Co., 3 L. D. 386. (Modified in New York Lode and Mill Site, 5 L. D. 513.)

242. An entry of a lode and mill site, defective in that notice of application for patent was not posted upon the mill site, may be referred to the Board of Equitable Adjudication. New York Lode and Mill Site, 5 L. D. 513. (Overruling Jno. W. Bailey and Grand View M. & Sm. Co., 3 L. D. 386.)

243. A mineral entry may be referred to the Board of Equitable Adjudication where posting of plat and notice of application for patent was not made on the claim owing to inaccessibility and danger of snow-slides, but in a conspicuous place on an adjoining claim. Rowena Lode, 7 L. D. 477.

244. Where an application is presented at the land office before the plat and notice have been posted on the claim, such application is void. De Long v. Hine, 1 L. D. 545.

245. A mining claim already patented cannot be made the basis of an application for additional surface ground or otherwise. Consolidated Bobtail G. M. Co., 9 C. L. O. 113.

246. The owners of mines may make application the same as though no homestead entry had been allowed. Bellows v. Champion Mine, 4 C. L. O. 17.

247. An application for patent to a mining claim within a tract selected by a railroad under its grant should not be received, but the mineral claimant may apply for a hearing to prove the mineral character of the land with view to cancellation of the selection of the company. Com'r to J. N. Lanman, Oct. 21, 1891.

248. An applicant embracing in his application an abandoned mine is not compelled to prove such abandonment in the absence of an adverse claim. Manhattan & San Juan S. M. Co., 2 L. D. 698.

249. When a request for a second survey of the same tract is made, the register's certificate that no application is pending must be filed. Orient and other Lodes, 7 C. L. O. 51.

250. The fact that the survey of a mining claim fails to show conflict with another claim the survey of which was actually later but which was first approved, is not a ground for rejection of an application for patent for the claim. Big Flat Gravel M. Co. v. Big Flat Gold M. Co., 1 L. D. 562.

251. The examination of an application may go beyond the papers in the case and into the general records of the Land Department, and if any part of the premises have been previously disposed of, an exception should be inserted in the patent. Seven Thirty Lode, 1 C. L. O. 82.

252. Proceedings to procure a United States patent should be regarded as a proceeding *in rem* conclusive upon all the world. 420 M. Co. v. Bullion M. Co., 9 Nev. 240; 8 Sawy. 634; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

253. Entry should not be allowed where the claim applied for is involved in a pending suit to determine the right of possession thereto instituted prior to publication of notice of application for patent. If on said suit it is adjudged that the applicant is not entitled to the possession of a part of the claim, he will not be allowed to enter such part. Northwestern Lode & Mill Site Co., 8 L. D. 437.

254. Proof required in application where proceedings were had against co-owners of a mine who failed to pay for assessment work, affidavits, etc. D. P. Whedon, 4 C. L. O. 50.

255. Where a mineral entry is allowed upon insufficient notice of application for patent, and is therefore canceled, the price paid for the land and the $10 fee paid at date of filing the application for patent will be repaid. John R. Magruder, 1 L. D. 526.

256. Procedure to obtain a patent described. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

257. Where a party commences proceedings for a mining patent on unsurveyed land in a certain land office, under the erroneous belief that such claim is within that land district, he must, on discovering his mistake, commence *de novo* before the proper land office. Barthel Jacobs, 12 C. L. O. 158.

258. A decision of a court of competent jurisdiction, upon a suit based upon an adverse claim against an application for a mineral patent, is reviewable by the higher courts where the amount in controversy is sufficient. Chambers v. Harrington, 111 U. S. 350.

259. An action in equity to restrain applicants from further prosecution of their application is not such an action as can be noticed by the General Land Office. Red Pine Lode, 1 C. L. O. 162.

260. The rejection by the Land Department of an application for patent to a mining claim cannot affect the possessory right of the applicant. Clipper M. Co., 22 L. D. 527.

261. An applicant for patent must show the claim to be valuable for mineral. Morrill v. Margaret M. Co., 11 L. D. 563.

262. As this claim for two lodes, embracing two thousand five hundred and twenty-four feet, had its inception by location and application for survey long anterior to the promulgation of the rule contained in circular of June 9, 1883, restricting the applications for mining patents to one lode, the case is allowed to proceed. W. M. McEwen, 11 C. L. O. 296.

263. An application for a mineral patent should not be canceled by the local land office. Com'r to Sacramento Office, Feb. 9, 1892.

264. The fact that the lode upon which the adverse claim is based was located after the application was filed is not a sufficient ground for dismissing such adverse claim. Ovens v. Stephens, 9 C. L. O. 190.

265. Where parties have acquiesced for eight years in a decision of the local land office dismissing their application for a mineral patent, and the land has meantime been patented to another, they have no standing in a court of equity for the purpose of attacking the patent. United States v. Marshall M. Co., 129 U. S. 579.

266. Certain lands were patented to the State under the internal improvement grant. Placer claims were thereafter located thereon, but the application therefor was rejected and proceedings in the court suggested. Twin Lakes Cons. Placer M. Co., 10 C. L. O. 292.

267. The land left in a forty-acre tract by a conflicting mineral survey may be located and described in an application as a lot. Geo. B. Foote, 9 C. L. O. 118.

268. A party withdrawing his opposition to an application should file a written statement to that effect. Jefferson M. Co. v. Pennsylvania M. Co., 1 C. L. O. 66.

269. In application for mines on the Comstock lode (Nevada), hearings may be had to determine whether they have been benefited or drained by the Sutro tunnel. Brunswick Lode, 3 C. L. O. 114.

270. The applicant for patent should not suffer by reason of the neglect of any officer of the government. Prince of Wales Lode v. Highland Chief Lode, 2 C. L. O. 2. (Citing Railroad Co. v. Smith, 9 Wall. 99.)

271. *Nunc pro tunc* proceedings may be allowed in mining applications in the absence of adverse claims. Arie Pinedo, 8 C. L. O. 5.

272. Where possessory title to a mining claim has become vested, either by location or transfer, in one who dies before securing patent, application and entry should be made in the name of the decedent, as the land office will not undertake to determine to whom the legal title to the claim belongs, but will leave that matter to be settled in the courts. Com'r to Helena Office, March 25, 1896, *In re* Broadwater Placer.

273. The fact that a location is based upon a discovery within a prior location does not, *proprio vigore*, invalidate the second location, as, if application is made therefor and no adverse claim is filed, it is conclusively presumed that the first locator had no right to the ground common to the two locations. Branagan v. Dulaney, 2 L. D. 744.

TITLE.

I. THE STATUTE.
II. REGULATIONS.
III. DECISIONS.
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3. *Agent.*
4. *Agricultural.*
5. *Alien.*
6. *Assignee.*
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III. DECISIONS — continued.
13. *Location.*
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24. *Work.*
25. *General.*

I. THE STATUTE.

(See sec. 2325, U. S. Rev. Stat., p. 187.)

II. REGULATIONS.

82. This affidavit should be supported by appropriate evidence from the mining recorder's office as to his possessory right, as follows, viz: Where he claims to be the locator, or a locator in company with others who have since conveyed their interest in the location to him, a full, true, and correct copy of such location notice should be furnished, as the same appears upon the mining records; such copy to be attested by the seal of the recorder, or if he has no seal, then he should make oath to the same being correct, as shown by his records. Where the applicant claims only as purchaser, a copy of the location record must be filed under seal or upon oath as aforesaid, with an abstract of title, under seal or oath as aforesaid, brought down to date of filing the application, tracing the right of possession by a continuous chain of conveyances from the original locators to the applicant, also certifying that no conveyances affecting the title to the claim in question appear of record other than those set forth in the accompanying abstract.

The abstracts herein required may be certified to by the proper recorder, or by any abstracter or abstract company, duly authorized by State or Territorial statute, if abstracts so certified by abstracters or abstract companies are by statute receivable as evidence in the courts of such State or Territory, in the same manner and to like extent that abstracts certified by the recorder are now admitted: *Provided*, That proof be furnished that the abstracts so certified by abstracters or abstract companies are receivable as evidence in the courts as aforesaid. (As amended Nov. 7, 1895.)

93. A party who is not an applicant for patent under section 2325, Revised Statutes, or the assignee of such applicant, is not entitled to make entry under said section, and in no case will the name of such party be inserted in the certificate of entry. This regu-

lation has no reference to proceedings under section 2326.

94. Any party applying to make entry as *trustee* must disclose fully the nature of the trust and the name of the *cestui que trust;* and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

III. Decisions.

1. "No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damage to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession." Sec. 910, U. S. Rev. Stat. See Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65; Hughes v. Devlin, 23 Cal. 501; 12 Mor. Min. Rep. 241.

2. The United States Surveyor General has no authority to determine questions of record title in mining property. J. H. Russell Lode, 5 C. L. O. 18; Thor Lode, 5 C. L. O. 51.

1. *Abstract.*

3. An application for a mineral patent must clearly show possessory title to the claim applied for. Montana Co., 6 L. D. 261.

4. Where the office of the custodian of the records from which abstracts of title must be made is far removed from the land office, the abstract of title to the mining claim should not be required to be brought down to date of filing of application for patent. Daniel Cameron, 4 L. D. 515.

5. Possessory title of an applicant for a mineral patent must be clearly shown. One claiming under a certificate of sheriff's sale of a mining claim until the execution of a sheriff's deed therefor does not hold legal title. Departmental decision of April 24, 1896, *In re* I. X. L. and Ophir Quartz Mine and Mill Site.

6. Under the Colorado statute legal title to land sold on execution remains in the judgment debtor until execution of the sheriff's deed. Hayes v. New York M. Co., 2 Colo. 273; Laffey v. Chapman, 9 Colo. 304; Manning v. Strehlow, 11 Colo. 451; 18 Pac. Rep. 625; Turner v. Sawyer, 150 U. S. 578.

7. Where a claim is sold on execution after application for patent has been made therefor and notice given thereof, the vendee merely takes a right to make entry of the claim, if he chooses so to do, and if he allows the applicant to make entry of the claim he has no legal remedy against the entryman, who, by entry, acquired a new and further title, which had not been sold to the judgment vendee. Hamilton v. Southern Nevada M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314.

8. The abstract of title required to be filed by an adverse claimant who claims as transferee of a locator need not be furnished if the records have been lost. Hawkeye Placer v. Gray Eagle Placer, 15 L. D. 45.

9. A defective abstract of title may be explained or supplemented by affidavits. Com'r to Helena Office, Sept. 26, 1894, *In re* Grubstake & Homestead Lodes.

10. An amended location, apparently made by a stranger, may be shown by affidavits to have been made as the agent of the real owner. Gray Copper Lode, 18 L. D. 536.

11. An entry may be allowed to stand although record title is imperfect by reason of the fact that no deeds were made at the time the claim was purchased by the entryman, as shown by affidavit. Departmental decision Sept. 8, 1892, *In re* Oxford Lode & Mill Site.

12. Proceedings in a mining application in case of defective abstract of title. J. Q. S. Lode, 10 C. L. O. 206.

13. The location notice and certificate of the mill site in this case was signed by a certain party who proved to be the agent of the owners of the mill site. In view of the facts presented, and that no adverse claim on his behalf was filed, the title is held to be in the applicants for patent. John W. Bailey, 11 C. L. O. 277.

14. When the given name of a party executing a deed differs from his name as found on the location notice, identity of persons must be shown. Kempton Mine, 1 C. L. O. 178.

15. Where a locator of a mining claim conveys the same with an agreement that he shall secure patent therefor in his own name, he may be allowed to make application and entry for the claim, notwithstanding his lack of title. A. P. Smith, 3 L. D. 340.

16. The abstract of title required under the regulations must be brought down to the date of filing the application, or as close thereto as is reasonably practicable. Daniel Cameron, 4 L. D. 515.

17. When entry is made by the assignee of the applicant the abstract of title should be brought down to the date of entry. Com'r to Moses M. Strong, August 3, 1891, *In re* Reed & Hillary Lode.

18. In an application for a mining patent a complete abstract of title only is required. Kempton Mine, 1 C. L. O. 178.

19. Contracts for conveyance before application for mining patent are sufficient title upon which to base entry, if full title was acquired before patent issued. Prince of Wales Lode, 2 C. L. O. 2.

20. An entry may be passed to patent which was made by one claiming under a deed which was in fact a mortgage, where perfect legal title has since become vested in the entryman. White Extension West Lode, 22 L. D. 677.

21. Where an applicant for a patent for a mine claims title through a deed signed by a party as an executor of a deceased party, he should file a certified copy of letters testamentary, with copy of will attached. N. E. Extension of Yosemite Mine, 3 C. L. O. 18.

22. Where the possessory title to a mining claim becomes vested (either by location or conveyance) in one who dies before applying for a patent, if application for patent and entry are made by the heir, devisee, executor or administrator, patent will issue in the name of the decedent, and the persons claiming under the decedent's title will be left to adjust their rights in the local courts. Com'r to Helena Office, March 25, 1896, *In re* Broadwater Placer.

23. One basing his title upon a relocation is not required to show title back of such relocation, even if he were one of the original owners. Gold Dirt Lode, 10 C. L. O. 119.

24. Title will not be traced by the Land Department beyond the entryman. F. P. Harrison, 2 L. D. 767; Whittaker v. Southern Pacific R. R. Co., 7 C. L. O. 85; Ophelia Pope Lowe (on review), 9 C. L. O. 192.

25. Title will be traced beyond the date of entry if a relinquishment of entered ground is made, for the purpose of ascertaining whether the entryman had title at date of executing the relinquishment. Com'r to Pueblo Office, Sept. 30, 1895, *In re* Lookout Lode; Ground Hog Lode, 20 L. D. 211.

26. All of the claims embraced in one application must be held in common by all the applicants. But if an entry, regular in all other respects, is made for claims not so held, separate patents may be issued thereon. Com'r to Central City Office, June 20, 1891, *In re* Morrell & Conemara Lode.

27. An entry so allowed will be canceled as to those claims not owned in common. Com'r to Helena Office, Aug. 5, 1893, *In re* Forest & Louis G. Lodes.

28. If title to the claim applied for is not clearly shown a patent will be refused. Brown v. Lewis, 1 C. L. O. 50.

29. "A party who is not an applicant for patent under sec. 2325, U. S. Rev. Stat., or the assignee of such applicant, is not entitled to make entry under said section, and in no case will the name of such party be inserted in the certificate of entry. This regulation has no reference to proceedings under sec. 2326." Circular, June 8, 1883, 2 L. D. 725; J. C. Baker Fraction Placer, 23 L. D. 112.

2. *Adverse.*

(See ADVERSE, p. 284.)

30. In an adverse suit each party must prove his right to a patent by a compliance with the statutes, State and Federal, and miners' rules and regulations in force relative to location, in order to recover a judgment for the ground in controversy. Mere failure on the part of the plaintiff to prove his case does not relieve the defendant from proving his title. Jackson v. Roby, 109 U. S. 440; Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Wolverton v. Nichols, 119 U. S. 485; 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309; Garfield M. & M. Co. v. Hammer, 130 U. S. 291; 6 Mont. 53; 8 Pac. Rep. 153; Lee Doon v. Tesh, 68 Cal. 43; 8 Pac. Rep. 621; Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419; McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329; Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304. (Second trial, 17 Colo. 242; 29 Pac. Rep. 173.) Bryan v. McCaig, 10 Colo. 309; 15 Pac. Rep. 413; Manning v. Strehlow, 11 Colo. 451; 18 Pac. Rep. 625; Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324; Burke v. McDonald, 2 Idaho, 646; 33 Pac. Rep. 49;

Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

31. The decision on adverse suit "must show not only that the successful party is entitled to the possession as against his opponent, but also as against all others, including the government, and by a compliance with all the laws applicable." Burke v. McDonald, 2 Idaho, 646; 33 Pac. Rep. 49. (Citing McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329; Manning v. Strehlow, 11 Colo. 451; 18 Pac. Rep. 625; Thomas v. Chisholm, 13 Colo. 105; 21 Pac. Rep. 1019; Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324.)

32. In an adverse suit each party must prove his title, and if no proof is submitted the suit will simply be dismissed without judgment. Bay State S. M. Co. v. Brown, 10 Sawy. 243.

33. In an adverse suit, even if the plaintiff offers no testimony, the defendant is not entitled to a judgment unless he affirmatively proves his title. Becker v. Pugh, 17 Colo. 243; 29 Pac. Rep. 173. (First trial, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304.)

34. The pleadings of each party to an adverse suit should show his title. Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 119; Cadierque v. Duran, 49 Cal. 356; Cronin v. Bear Creek G. M. Co., 32 Pac. Rep. 204.

35. The United States is not a party to a suit based upon an adverse claim filed under the provisions of section 2326, United States Revised Statutes, and is not concluded by any decision rendered on such a suit, the object of which is to try only the right of possession of the parties. (Citing and approving Alice Placer, 4 L. D. 314.) Perego v. Dodge, 163 U. S. 160. See S. C., 9 Utah, 3; 33 Pac. Rep. 221.

36. On adverse suit the court has to determine only the right of possession, not the right of either party to a patent. Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

37. The judgment rendered by the court upon an adverse suit is conclusive upon the Land Department only as to the right of possession, and does not relieve the Department from its duty of requiring proof of compliance with the law by the adverse claimant. Alice Placer, 4 L. D. 314.

38. Actual possession is not required to entitle a person, holding under location, to bring suit under section 2326, United States Revised Statutes. Burke v. McDonald, 2 Idaho, 310; 13 Pac. Rep. 351.

39. Plaintiff in an adverse suit need not show possession of land in controversy, but is required to show right of possession. Golden Fleece G. & S. M. Co. v. Cable Cons. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

40. Defendant in an adverse suit cannot defeat plaintiff's title by showing that a forfeiture notice given by plaintiff to co-owners was insufficient. That point may be raised only by the co-owners. Becker v. Pugh, 17 Colo. 243; 29 Pac. Rep. 173. See S. C., 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304.

41. An adverse complaint should allege all material facts as to plaintiff's ownership; that application for patent has been filed by defendant; that suit is based on adverse claim duly filed, and should show conflict between the claims. Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419; Mattingly v. Lewisohn, 8 Mont. 259; 19 Pac. Rep. 310; Cronin v. Bear Creek Gold M. Co., 32 Pac. Rep. 204.

42. An adverse complaint alleging plaintiff to be the owner of conflict by title adverse to defendant's, and that defendant's claim is without right, is sufficient. Rough v. Simmons, 3 Pac. Rep. 804; Rough v. Booth, 3 Pac. Rep. 805.

43. The sufficiency of an adverse complaint which simply alleges plaintiff to be the owner of the ground in controversy is waived by traversing his allegation. Bushnell v. Crooke M. & Sm. Co., 11 Colo. 247; 21 Pac. Rep. 931.

44. An adverse complaint under the Nevada statutes need only set up filing of mineral application by defendant, and adverse ownership by plaintiff. Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; 114 U. S. 576.

45. Adverse suit must be brought in proper form. If plaintiff is in possession he should sue to quiet title. If not in possession he should bring ejectment. Wolverton v. Nichols, 119 U. S. 485. See 2 Pac. Rep. 306; 15 Mor. Min. Rep. 309.

46. An adverse suit may be maintained by one in possession. Hamilton v. Southern Nevada M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314.

47. Dower interest in a mining location must be protected by an adverse claim under section 2326, United States Revised Statutes, as the possessory title which is subject to dower merges into the absolute fee-simple title on issuance of patent. Black v. Elkhorn M. Co., 49 Fed. Rep. 549.

48. One who fails to adverse an application for patent is thereafter estopped from setting up any legal or equitable title to the land applied for. Wight v. Tabor, 2 L. D. 738.

49. An adverse claimant whose adverse suit has been dismissed will not thereafter be heard to attack the validity of applicant's title. Kannaugh v. Quartette M. Co., 16 Colo. 341; 27 Pac. Rep. 245.

50. One who files no adverse will not be allowed to question the legality of applicant's title thereafter. Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77. (Affirmed, 13 Colo. 174; 22 Pac. Rep. 436.) Hunt v. Eureka Gulch M. Co., 14 Colo. 451; 24 Pac. Rep. 550; Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Wight v. Dubois, 21 Fed. Rep. 693.

51. "The only place in which controversies between conflicting mineral claimants or adverse claimants can be heard is a court of competent jurisdiction." Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584; Frederick A. Williams, 17 L. D. 282.

52. The Land Department has no jurisdiction to determine or pass upon controversies between adverse claimants as to the right of possession of a mining claim, or upon any question as to the priority of such right. Bright v. Elkhorn M. Co., 8 L. D. 122.

53. The defendant in an adverse suit may set up title in his answer, and secure judgment declaring him to be the owner if he proves title. Perego v. Dodge, 9 Utah, 3; 33 Pac. Rep. 221. See 163 U. S. 160.

54. The owner of a mining claim, holding under possessory title, who has agreed to convey good and sufficient title thereto, the prospective transferee being in possession, has such an interest in the property as entitles him to file an adverse claim against an application for patent to a conflicting claim, and to have a trial thereon. This right cannot be affected by State laws relating to possessory actions. (Reversing the Supreme Court of Montana.) Wolverton v. Nichols, 119 U. S. 485. See 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309.

55. Where an adverse claim is filed against an application for patent, the applicant may (1) suspend proceedings before the Land Department and litigate with the adverse claimant; (2) relinquish the ground in conflict from his application (litigating therefor), and take patent for the remainder of his claim; or (3) dismiss his application for patent in its entirety and continue to claim under his possessory title. Branagan v. Dulaney, 2 L. D. 744.

56. "We can imagine several ways in which it can be shown that the adverse claim is waived without invading the jurisdiction of the court while the case is still pending. One of these would be the production of an instrument signed by the contestant, and duly authenticated, that he had sold his interest to the other party, or had abandoned his claim and his contest. Or, since the Act says that all proceedings shall be stayed in the land office from the *filing of the adverse claim*, and not from the commencement of the action in the court, within thirty days, such delay of thirty days is made, by the statute, conclusive of a waiver. A filing in the records of the court, by the plaintiff, of a plea that he abandons his cause or waives his claim, might authorize the land office to proceed." Richmond M. Co. v. Rose, 114 U. S. 576.

57. Reversal of a judgment on adverse suit denying the right of either party on appeal by one party, reverses and vacates the entire decision, and the case should be tried *de novo*. Mattingly v. Lewisohn, 35 Pac. Rep. 111.

3. *Agent.*

(See AGENT — ATTORNEY, p. 374.)

58. If A. locates a claim in the name of B. and holds and works the same, the law presumes it to be done by A. as agent of B., and A. can maintain no action for the claim in his own name. Van Valkenburg v. Huff, 1 Nev. 142; 9 Mor. Min. Rep. 467.

59. A location made by an individual in his own name may be shown to have been made by him as agent of another. Sold Again Lode, 20 L. D. 58.

60. An agent after the agency ceases may acquire an interest in a conflicting claim. Con. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

4. *Agricultural.*

(See AGRICULTURAL CLAIM, p. 376.)

61. "To constitute the exemption contemplated by the pre-emption act under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. . . . A change in the conditions occurring subsequently to the sale whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not 'known mines,' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act, cannot be successfully assailed." Colorado Coal & Iron Co. v. United States, 123 U. S. 307.

62. No title can be obtained from the United States to land known at the time of sale to be valuable for its minerals, under the pre-emption, homestead or town site laws, or in any other way than as prescribed by the laws specifically authorizing the sale of such lands. Deffeback v. Hawke, 115 U. S. 392.

63. Open and notorious possession for mining is sufficient to charge an applicant for agricultural patent with notice of the mineral character of the land, and to bring such land within the description of "known mineral deposits." Gold Hill Qtz. M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

5. *Alien.*

(See CITIZENSHIP, p. 48.)

64. A conveyance of a mining claim by a qualified locator to an alien does not operate as an abandonment of the claim, but the alien may hold the claim as against all but the United States; and where the alienage of an applicant is set up by an adverse claimant, the declaration of intention to become a citizen of the United States, made by the applicant during the pendency of the adverse suit, but before judgment, will render his title good as far as citizenship is concerned. Manuel v. Wulff, 152 U. S. 505. (Reversing S. C., 9 Mont. 279; 23 Pac. Rep. 723, and citing Man v. Huk, 3 L. D. 452; Ole Krogstad, 4 L. D. 564; Lord v. Perrin, 8 L. D. 536; Jackson v. Beach, 1 Johns. Cases, 399; Governeur v. Robertson, 11 Wheat. 332; Osterman v. Baldwin, 6 Wall. 116.)

65. A conveyance of a mining claim to an alien operates as an abandonment of the claim. Lee v. Justice M. Co., 29 Pac. Rep. 1020.

66. A conveyance of a mining location by a qualified locator to an alien is not an abandonment of the location, but the alien may hold as against all but the State or the United States, and a conveyance by him to a citizen carries good title. Gorman M. Co. v. Alexander, 2 S. Dak. 557; 51 N. W. Rep. 346.

67. A mining claim passing into the possession of an alien, although located by a citizen, reverts to the government, and may be relocated. Tibbitts v. Ah Tong, 4 Mont. 536.

68. An alien who has not declared his intention of becoming a citizen may not locate a mining claim and cannot hold by possession against one who claims by a legal location. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 15 Nev. 450; 12 Nev. 312; 1 Mor. Min. Rep. 120.

69. An alien in actual possession of public land will be protected against a naked trespasser not claiming under government title. Courtney v. Turner, 12 Nev. 345.

70. An alien cannot locate, possess, purchase or acquire title by patent to mineral land. Tibbitts v. Ah Tong, 4 Mont. 536.

71. Title of a claimant of the public mineral lands as locator of a mining claim may not be questioned on ground of alienage by any one excepting the United States, or in proceedings to obtain a United States patent. (Adverse suit.) Billings v. Aspen M. & Sm. Co., 10 U. S. App. 1, 322; 51 Fed. Rep. 338; Wood v. Aspen M. & Sm. Co., 36 Fed. Rep. 25.

72. An alien, though he may not locate or enter public lands, may, until office found, hold a mining claim under possessory title as grantee of a qualified locator. Ferguson v. Neville, 61 Cal. 356.

73. The grantee of an alien locator, who takes possession and does all acts required by law to maintain a location, has good posses-

sory title, provided no adverse rights had intervened between dates of location and transfer. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

74. A purchaser from an alien may relocate the claim and thereby acquire possessory title, but he acquires none by the purchase. Beckner v. Coates, 8 C. L. O. 18.

75. A Territory cannot pass laws affecting the right of aliens to hold and work mining claims. Territory v. Lee, 2 Mont. 124; 6 Mor. Min. Rep. 248.

6. *Assignee.*

76. The grantee of an entryman before issuance of patent takes no better title than his grantor, and cannot pose before the Land Department as an innocent purchaser. R. M. Chrisinger, 4 L. D. 347.

77. A transferee of an entryman before issuance of patent stands only in the place of the entryman. William E. McIntyre, 6 L. D. 503.

78. A mineral patent will issue only to a qualified applicant for patent or to one claiming under him by transfer before entry. J. C. Baker Fraction Placer, 28 L. D. 112.

79. A purchaser of land after entry but before issuance of patent is simply the assignee of an equitable interest, and as such takes with notice of all defects in title. C. A. Kibling, 7 L. D. 327; Murphy v. Sanford, 11 L. D. 123; George Hague, 13 L. D. 388; United States v. Miller, 14 L. D. 617.

80. "Until patent has issued, the Department has full and complete jurisdiction over all entries not confirmed by the statute, and persons who purchase on the faith of the receiver's receipt do so at their own risk and take the land subject to all the infirmities of title, so far as the government is concerned." Louise M. Co., 22 L. D. 662.

81. The transferee of a coal entryman prior to issuance of patent takes no greater right than his grantor had, *i. e.*, an equitable title, and the entry is subject to cancellation by the Land Department just as though no transfer had been made. Scott v. Sheldon, 15 L. D. 588 (on review).

82. A grantor of a mining claim is estopped from alleging that he had no legal location at date of sale. Belcher Cons. G. M. Co. v. Defferrari, 62 Cal. 160; Stinchfield v. Gillis, 96 Cal. 33; 30 Pac. Rep. 839; S. C., 107 Cal. 84; 40 Pac. Rep. 98.

83. The grantor of a mining claim may be called as a witness to prove the invalidity of the location sold. Johnson v. Parks, 10 Cal. 446; 4 Mor. Min. Rep. 316.

84. Declarations of a party in possession and claiming title to a mining claim, made before parting with his interest, against the validity of the location of such claim, are admissible in evidence against the grantee of the declarant. Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362. See 111 U. S. 350.

7. *Conveyance.*

(See CONVEYANCE, p. 393.)

85. In California, before 1860, a verbal transfer of a mining claim was held good when accompanied by change of possession (Table Mtn. Tunnel Co. v. Stranahan, 20 Cal. 198; 9 Mor. Min. Rep. 457; King v. Randlett, 33 Cal. 321); but in 1860 an act was passed with reference to gold mines (Laws 1860, p. 175), and afterward extended to all mines (Laws 1863, p. 98), which did away with oral transfers. See Patterson v. Keystone M. Co., 30 Cal. 360; Goller v. Fett, 30 Cal. 481; 11 Mor. Min. Rep. 171; Folger v. Coward, 35 Cal. 652; Melton v. Lambard, 51 Cal. 258; 14 Mor. Min. Rep. 695; Garthe v. Hart, 73 Cal. 541; 15 Pac. Rep. 93; 15 Mor. Min. Rep. 492.

86. A written conveyance is not necessary to the transfer of a mining claim. Union Cons. M. Co. v. Taylor, 100 U. S. 37; 5 Mor. Min. Rep. 823; Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198; 9 Mor. Min. Rep. 457.

87. The rule allowing parol sale of mining claims only applies where the grantor actually delivers possession. Where the land is in the adverse possession of a third party there must be a written conveyance. Copper Hill M. Co. v. Spencer, 25 Cal. 18; St. John v. Kidd, 26 Cal. 263; 4 Mor. Min. Rep. 454.

88. Under section 1091, Civil Code of California, a transfer of a mining claim must be in writing. Garthe v. Hart, 73 Cal. 541; 15 Pac. Rep. 93; 15 Mor. Min. Rep. 492.

89. A mining claim can, under the Statute of Frauds, be transferred only by operation of law or instrument in writing. Moore v. Hammerstag, 109 Cal. 122; 41 Pac. Rep. 805.

90. A mining claim is real property, and must be conveyed as such. Melton v. Lambard, 51 Cal. 258; 14 Mor. Min. Rep. 695.

91. A verbal sale, even if accompanied by delivery of possession, does not pass legal title. Goller v. Fett, 30 Cal. 481; 11 Mor. Min. Rep. 171.

92. Parol sale of a mining claim is sufficient, with delivery of possession. Gore v. McBrayer, 18 Cal. 582 (1861); 1 Mor. Min. Rep. 645; Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198; 9 Mor. Min. Rep. 457 (1862); Gatewood v. McLaughlin, 23 Cal. 178; Antoine Co. v. Ridge Co., 23 Cal. 219 (1863).

93. Possesory title to a mining claim is real estate, and must be conveyed by deed. It is a grant by the government to the locator of an interest in the public domain, and the thing granted must be real estate. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196; Hopkins v. Noyes, 4 Mont. 550; 12 Pac. Rep. 280; 15 Mor. Min. Rep. 287. (Distinguishing Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198; 9 Mor. Min. Rep. 457.)

94. A parol partition of a mining claim, if followed by exclusive possession of the several parcels, is doubtless valid; the parties cease to be tenants in common, and forever afterwards deal at arm's length. 420 M. Co. v. Bullion M. Co., 3 Sawy. 634; 9 Nev. 240; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

95. In early times, parol transfers of mining claims, followed by change of possession, were recognized as legal. Kinney v. Cons. Virginia M. Co., 4 Sawy. 382; 10 Mor. Min. Rep. 457.

96. Mining claims are real property, and pass by deed. Houtz v. Gisborn, 1 Utah, 173; 2 Mor. Min. Rep. 340.

97. In the absence of local statutes or rules, a writing is not necessary to the conveyance of a mining claim. Lockhart v. Rollins, 2 Idaho, 503; 21 Pac. Rep. 413.

98. In the absence of a statute, a writing is not necessary to the transfer of title to a mining claim, when such transfer is accompanied by possession of the grantee. Union Cons. M. Co. v. Taylor, 100 U. S. 37; 5 Mor. Min. Rep. 323.

99. A locator's right to a lode can only be conveyed by deed. Murley v. Ennis, 2 Colo. 300; 12 Mor. Min. Rep. 360.

100. Mining claims under the Montana statutes are real estate and are within the statute of frauds, and can only be transferred by deed. Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287.

101. Parol sale, *bona fide*, with delivery of possession, is valid as against a subsequent sale of the same grantor made by deed in writing duly acknowledged. Patterson v. Keystone M. Co., 23 Cal. 575 (1863). (Cases of Atwood v. Fricot, 17 Cal. 38; 2 Mor. Min. Rep. 305 (1860–61), and English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202 (1860–61), as to possession of mining claims, affirmed.)

102. The name by which a lode claim is conveyed is immaterial if it may be identified. Phillpotts v. Blasdell, 8 Nev. 61; 4 Mor. Min. Rep. 841.

103. A conveyance of a lode carries all title thereto, whether held under one or more locations thereof, and the name used is immaterial if the intent is clear. Weill v. Lucerne M. Co., 11 Nev. 200; 3 Mor. Min. Rep. 372.

104. The name by which a lode is conveyed is immaterial, if the property may be identified from the description given in the deed. Lebanon M. Co. v. Cons. Republican Mtn. M. Co., 6 Colo. 381.

105. A mining claim may be conveyed by name, reference being made to the location record. Carter v. Bacigalupi, 23 Pac. Rep. 361.

106. A conveyance made by a person as officer of a corporation, for the corporation, will not estop him from asserting a personal right to the property so conveyed. Nichols v. Becker, 11 L. D. 8.

107. The deed of a corporation must show the consent of stockholders. Pekin M. & M. Co. v. Kennedy, 22 Pac. Rep. 679.

108. A deed, to give constructive possession of an entire claim to one who enters thereunder, must contain definite boundaries which can be located, marked and made known from the deed itself. Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217.

109. A deed, not giving boundaries, but referring to a location certificate in which a full description is given, will extend the possession to the entire claim described in such location certificate. Harris v. Equator M. & Sm. Co., 8 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178.

110. A deed of mineral entries numbers 1 and 2, lots 3 and 4, patented as the A. and B. claims, may, if such appears to have been the intent of the parties, be held to convey all of the grantor's title to the A. and B. claims, even though the patent only covered parts thereof. Jackson v. Dines, 13 Colo. 90; 21 Pac. Rep. 918; Crescent M. Co. v. Wasatch M. Co., 19 Pac. Rep. 198.

111. A deed of a lode conveys all title of the grantor thereto, whether held by one location or another. Phillpotts v. Blasdell, 8 Nev. 61; 4 Mor. Min. Rep. 341.

112. No precise form of words is necessary to a bill of sale of a mining claim, if it is evidently intended by the owner to pass title. Meyers v. Farquharson, 46 Cal. 190.

113. Instruments conveying mining claims need not be under seal. Draper v. Douglass, 23 Cal. 347 (1863).

114. When the owner of a lode claim sells a part of his location, section 2336, United States Revised Statutes, does not apply in deciding the respective rights of grantor and grantee to work the lode on the dip, but the grantee takes, absolutely, all of every vein the apex of which is in the granted premises, as against the grantor, though they may be intersected by a prior located vein of the grantor. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98. See S. C., 96 Cal. 33; 30 Pac. Rep. 839.

115. A claimant who has published a notice of application for patent may not, by relinquishment, give to a claimant of a conflicting claim the right to enter the conflict without publication. Com'r to Pueblo Office, Jan. 17, 1896, *In re* Providence Lode.

8. *Co-owners.*

(See CO-OWNERS, p. 396.)

116. The possession of one co-tenant is the possession of all. Union Cons. S. M. Co. v. Taylor, 100 U. S. 37; 5 Mor. Min. Rep. 323; Waring v. Crow, 11 Cal. 366; 5 Mor. Min. Rep. 204; Colman v. Clements, 23 Cal. 245; 5 Mor. Min. Rep. 247.

117. The possession of one co-tenant in common is not adverse to his co-tenants. Union Cons. S. M. Co. v. Taylor, 100 U. S. 37; 5 Mor. Min. Rep. 323.

118. Possession of a mining claim by one tenant in common is possession of all, unless it becomes adverse. Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188; 1 Mor. Min. Rep. 17.

119. Co-tenants are presumed, by law, to own equal interests until the contrary be shown. Nippel v. Hammond, 4 Colo. 211.

120. To give a person the right to procure by forfeiture proceedings, under section 2324, United States Revised Statutes, the interest of another in a mining claim held by possessory title, the two persons must not only be co-owners at date of the forfeiture notice, but during the year in which the work was done upon the claim. Turner v. Sawyer, 150 U. S. 578.

121. Where several persons post notice of location on a mining claim and sign the same as locators, a subsequent notice posted on the same claim, signed by some of the original locators and other persons whose names did not appear in the first notice, is an original notice so far as the new locators are concerned, but does not affect the rights of the prior locators whose names are omitted, nor operate as an abandonment of the first location by the persons whose names are signed to both notices; and in an action by all the persons whose names are signed to the notices to quiet their title as against an adverse claimant, the second notice is admissible in evidence. Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182.

122. The taking of hostile possession of a mining claim by one tenant in common and excluding the co-tenant is an ouster, from the date of which the Statute of Limitations begins to run in favor of the tenant so taking possession, and against his co-tenant. 420 M. Co. v. Bullion M. Co., 3 Sawy. 634; 9 Nev. 240; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

123. Where a relocation of a forfeited claim is made by one of the owners with the understanding that it is made for the benefit of all, he will be declared trustee for his co-owners. Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816.

124. If, through conspiracy between one tenant in common of a mining claim and a stranger, the claim is abandoned, and is relocated by the stranger, all rights under the original location are lost. Injured owners must proceed in equity to have the relocator declared trustee for their use. Doherty v. Morris, 11 Colo. 12; 16 Pac. Rep. 911.

125. One tenant in common of a mining claim promised his co-tenant that he would perform the required annual labor to hold the claim, but fraudulently failed so to do, and relocated the claim for himself. *Held*, that the claim had been legally abandoned and was therefore subject to the relocation; but that the relocator, by reason of the fraud, might be declared a constructive trustee under the relocation for his co-tenant as to the co-tenant's interest in the original location. Saunders v. Mackey, 5 Mont. 523; 6 Pac. Rep. 361.

125a. Tenants in common in a mine may join in an action to recover possession of all their undivided interests. Goller v. Fett, 30 Cal. 481; 11 Mor. Min. Rep. 171.

126. A tenant in common of a mining claim, holding under possessory title, is not bound to file an adverse claim against an application for patent to the claim, filed by a co-owner. The statute contemplates the filing of an adverse by one setting up a title *against* the mining claim applied for, not by one claiming an interest *in* the claim. Turner v. Sawyer, 150 U. S. 578; Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816.

127. There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner of his share in the company assets and business to one or more of his associates without the knowledge of the other associates. Bissell v. Foss, 114 U. S. 252.

128. In the absence of a special contract there is no relation of trust between tenants in common of mining property who are partners only for the purpose of developing the same, which prevents one from receiving a higher sum for his interest than the others. Harris v. Lloyd, 11 Mont. 390; 28 Pac. Rep. 786.

129. A parol contract to the effect that if the defendant should secure a paying quartz mine through the efforts of the plaintiff, the defendant would, in addition to wages, give the plaintiff an interest in such mine, is as to the interest to be given so uncertain and indefinite as to be unenforcible by a court of equity, and the court has no right to assume that the interest to be conveyed is a one-half interest rather than a one-eighth or any other interest, in the absence of an allegation and finding that the parties understood that they were to own equal and undivided interests in the mine. Berry v. Woodburn, 107 Cal. 504; 40 Pac. Rep. 802.

130. One who locates a claim in the names of himself and others, even without their consent, makes such others co-owners with himself, and cannot deprive them of their interests by destroying the location notice and posting a new one, omitting their names. Morton v. Solambo M. Co., 26 Cal. 527; 4 Mor. Min. Rep. 463.

131. Those whose names are inserted in a notice of location are presumed to have assented, in the absence of a contrary showing. Morton v. Solambo M. Co., 26 Cal. 527; 4 Mor. Min. Rep. 463.

132. One in whose name the location is made is presumed *prima facie* to assent, and becomes the owner of the location, and the one making the location cannot claim to be the owner. Van Valkenburg v. Huff, 1 Nev. 142; 9 Mor. Min. Rep. 467.

133. A location made by A. in the name of B. constitutes B. the legal owner, and A. cannot compel B. as trustee to convey to him. Moore v. Hammerstag, 109 Cal. 122; 41 Pac. Rep. 805.

134. Where A. legally locates a claim in the names of himself and B. they become tenants in common, even if the location was made without B.'s knowledge, and A. cannot dispose of B.'s interest. Chase v. Savage S. M. Co., 2 Nev. 9; 9 Mor. Min. Rep. 476.

9. *Discovery.*

(See DISCOVERY, p. 89.)

135. Local rules and customs of miners recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. Jennison v. Kirk, 98 U. S. 453. (Affirming Titcomb v. Kirk, 51 Cal. 288; 5 Mor. Min. Rep. 10.)

136. Discovery and appropriation is the source of title of a mining claim under the act of 1866, as well as that of 1872. Jackson v. Roby, 109 U. S. 440.

137. Discovery and appropriation are recognized as the sources of title to mining claims, and development by working as the condition of continued ownership, until issuance of patent therefor. (Entry of the claim and payment for the land.) Erhardt v. Boaro,

113 U. S. 527. See 2 McCrary, 141; 1 Mor. Min. Rep. 452.

138. Discovery and appropriation are the sources of title to mining claims, and development by work the condition of their continued possession. O'Reilly v. Campbell, 116 U. S. 418.

139. Ground actually held and possessed by right of a discovery, even though not located, is reserved from location by a subsequent discoverer. Faxon v. Barnard, 2 McCrary, 44; 4 Fed. Rep. 702; 1 Colo. Law Rep. 147; 9 Mor. Min. Rep. 515.

140. One who has made a location without a discovery may hold it as against one who has no better title. Field v. Gray, 25 Pac. Rep. 798.

141. Where two conflicting locations are made, neither based upon a discovery, the second locator has the superior right if he first makes a discovery. But before a discovery by either, the first locator may prevent the second from trespassing upon his claim. Crossman v. Pendery, 2 McCrary, 139; 8 Fed. Rep. 693; 1 Colo. Law Rep. 496; 4 Mor. Min. Rep. 481.

142. If the title to the land on which the discovery is situated fails, the whole location is lost. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

143. At the time California was acquired by the United States the discoverer of a mine was rewarded by an investiture, *ipso facto*, with a perpetual property and ownership of the mine. Castillero v. United States, 2 Black, 1.

10. *Entry.*

(See ENTRY, p. 239.)

144. After a legal entry of, and payment for, public land, the entryman holds complete equitable title, the United States thereafter holding the naked legal title in trust for the entryman until the issuance of patent. Carroll v. Safford, 3 How. 441; Witherspoon v. Duncan, 4 Wall. 210; Hughes v. United States, 4 Wall. 232; Heydenfeldt v. Dana G. & S. M. Co., 93 U. S. 634; Wirth v. Branson, 98 U. S. 118; Steel v. St. Louis Sm. Co., 106 U. S. 447; Defeback v. Hawke, 115 U. S. 392; Cornelius v. Kessel, 128 U. S. 456; Benson M. & Sm. Co. v. Alta M. & Sm. Co., 145 U. S. 428. (See 16 Pac. Rep. 565.) Bigelow v. Chatterton, 10 U. S. App. 267; Union M. & M. Co. v. Danberg, 2 Sawy. 450; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; Amador-Medean G. M. Co. v. South Spring Hill G. M. Co., 13 Sawy. 523; 36 Fed. Rep. 668; Astrom v. Hammond, 3 McLean, 107; Carroll v. Perry, 4 McLean, 26; United States v. Freyberg, 32 Fed. Rep. 195; Hamilton v. Southern Nevada M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314; Jones v. United States, 35 Fed. Rep. 561; Montgomery v. United States, 36 Fed. Rep. 4; Blackley v. Coles, 6 Colo. 350; Poire v. Wells, 6 Colo. 406; Omaha & Grant Sm. & Red. Co. v. Tabor, 13 Colo. 41; 21 Pac. Rep. 925; People v. Shearer, 30 Cal. 648; Deno v. Griffin, 20 Nev. 249; 20 Pac. Rep. 308; Ross v. Supervisors, 12 Wis. 38; Gwynne v. Niswanger, 15 Ohio, 368; Goodlett v. Smithson, 5 Port. (Ala.) 246; F. P. Harrison, 2 L. D. 767.

145. A legal entry of public land vests the equitable title thereto in the entryman, the United States thereafter holding the legal title in trust for the entryman until a patent issues, and this right cannot be defeated by an order of the Land Department, issued without warrant of law, canceling the entry. Cornelius v. Kessel, 128 U. S. 456.

146. In the Federal courts a certificate of land may not be considered as evidence of the holder's legal title, as the making of entry vests only equitable title in the entryman. Langdon v. Sherwood, 124 U. S. 74.

147. The owner of a mining claim need not purchase the same from the United States unless he so desires. Chapman v. Toy Long, 4 Sawy. 28; 1 Mor. Min. Rep. 497; Smith v. Van Clief, 6 C. L. O. 2.

148. Entry should not be allowed where the claim applied for is involved in a pending suit to determine the right of possession thereto, instituted prior to publication of notice of application for patent. If on said suit it is adjudged that the applicant is not entitled to the possession of a part of the claim, he will not be allowed to enter such part. Northwestern Lode & Mill Site Co., 8 L. D. 437.

149. The cancellation of a mineral entry has for its effect simply to set aside all that has been done by the claimant toward the acquisition of a patent, and relegates him to his possessory title. John R. Magruder, 1 L. D. 526; McGowan v. Alps Cons. M. Co., 23 L. D. 118.

150. In an action upon an adverse claim, where plaintiffs, as evidence of their title, had

introduced the receiver's receipt for the entry thereof, it is admissible for the defendants to prove by decisions of the Land Department that the entry had been canceled and set aside on the protest against the issuance of patent. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

11. *Ejectment.*

(See ADVERSE and SUIT, pp. 284 and 445.)

151. In ejectment, possession by plaintiff is *prima facie* evidence of legal title, and is sufficient as against a mere trespasser. Campbell v. Rankin, 99 U. S. 261; 12 Mor. Min. Rep. 257.

152. In an action of ejectment the legal title must prevail. The patent of the United States passes that title. Steel v. St. Louis Sm. Co., 106 U. S. 447.

153. Defendant in ejectment suit involving a mining claim may prove plaintiff's title to have been lost by abandonment of the claim, under a general denial of plaintiff's title. Bell v. Brown, 22 Cal. 671; 5 Mor. Min. Rep. 240.

154. In an ejectment suit where plaintiff shows title by patent for a mining claim, and defendant admits possession for town site purposes, plaintiff is entitled to judgment without showing that the surface is necessary to the working of his mine. Abbott v. Primeaux, 16 Nev. 361.

155. The rule in ejectment that plaintiff must recover on the strength of his own title, not on the weakness of that of his adversary, is not applicable to suits for possession of mining claims, the question there being which one has the better right. Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 663.

156. "If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength of his own title, and that the defendant in possession can lawfully say,—until you show *some* title you have no right to disturb me—it has not been pointed out." Reynolds v. Iron Silver M. Co., 116 U. S. 687.

157. Plaintiff in ejectment for a mining claim may rest his right to recover upon prior possession, as such action does not necessarily put in issue the legal title, and plaintiff's recovery will not be conclusive of his grantor's title. Grady v. Early, 18 Cal. 108; 12 Mor. Min. Rep. 104.

158. There can be no color of title in an occupant of land who does not hold under an instrument or proceeding of law purporting to transfer the title or to give the right of possession. Nor can good faith be affirmed of a party holding adversely where he knows that he has no title, and that under the law, which he is presumed to know, he can acquire none. So held, where, in an action of ejectment for known mineral land by the holder of a patent of the United States, the occupant set up a claim to improvements made thereon under a statute of Dakota, which provides that, "in an action for the recovery of real property, upon which permanent improvements have been made by a defendant or those under whom he claims, holding under color of title, adversely to the claim of plaintiff, in good faith, the value of such improvements must be allowed as a counter-claim by such defendant," he not having taken any proceedings to acquire the title under laws of Congress authorizing the sale of such lands, or to acquire the right of possession under the local customs or rules of miners of the district. Deffeback v. Hawke, 115 U. S. 392.

12. *Grant.*

(See GRANT, p. 364.)

159. Under a grant of school lands, "The State's title vests, if at all, at the date of the completion of the survey (Cooper v. Roberts, 18 How. 173; Virginia Lode, 7 L. D. 459); and, if the land, although in reality mineral, was not then *known* to be mineral, the subsequent discovery of its mineral character would not devest the title which had already passed." Abraham L. Miner v. State of California, 9 L. D. 409.

160. A person claiming under a mineral location, to be entitled to the possession as against one claiming under a patent to a railroad company, must show that at date of such patent the land was *known* to be more valuable for mining than for agricultural purposes, and in determining the relative value for such purposes, subsequent changes cannot be considered. Hunt v. Steese, 75 Cal. 620; 17 Pac. Rep. 920.

161. In determining controversies between parties on the public domain, where neither can have absolute rights, it is a convenient rule to presume a grant from the government, of mines, water privileges and

the like, to the first appropriator; but such a presumption is without force as against the superior proprietor. Boggs v. Merced M. Co., 14 Cal. 279 (1859-60); 10 Mor. Min. Rep. 384; S. C., 3 Wall. 304.

13. *Location.*

(See LOCATION, p. 77.)

162. "A location since the 10th day of May, 1872, based on a discovery made within the limits of a claim properly located, and not abandoned or lost by failure to perform the labor thereon required by law, is an invalid location; for by the provisions of section 2322, the locator of such claim has the exclusive right of possession and enjoyment of all surface included within the lines of the location, 'and of all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines.' If the locator then has the exclusive right of the possession and enjoyment, how can a prospector go on such claim and make a valid discovery?" Branagan v. Dulaney, 2 L. D. 744.

163. "A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second." Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795.

164. The valid location of a mining claim is a grant from the government to the person making the location. The location is the inception of the grant, and the patent is its consummation. The grant is kept alive by representation (work). A failure to represent forfeits the grant, and makes void the title acquired by location, and the ground thereupon becomes again subject to location and purchase. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153. See 130 U. S. 291.

165. One who makes a valid mining location acquires thereby a *vested* right (conditional on continued compliance with the law) to the exclusive right of enjoyment of all the surface included therein. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Merced M. Co. v. Fremont, 7 Cal. 317 (1857); Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Atkins v. Hendree, 1 Idaho, 95; 2 Mor. Min. Rep. 328; Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196; Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. Rep. 714; Russell v. Chumasero, 4 Mont. 309; 1 Pac. Rep. 713; 15 Mor. Min. Rep. 508; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795; Blake v. Butte S. M. Co., 3 Utah, 54; 9 Mor. Min. Rep. 503; Fort Maginnis Case (Op. Atty. Gen.), 1 L. D. 552; Lewis Smith, 1 L. D. 615; Branagan v. Dulaney, 2 L. D. 744; Cordell Placer, 4 L. D. 476; John U. Gabathuler, 15 L. D. 418; Piru Oil Co., 16 L. D. 117.

166. A legal location of a mining claim upon the unappropriated public domain confers a vested right in the locator of which he cannot be divested by any subsequent act of the Executive Department of the government. Fort Maginnis Case (Op. Atty. Gen.), 1 L. D. 552.

167. The owner of a valid location is entitled to its exclusive use and possession, and a stranger who enters thereon for the purpose of mining, cutting timber or otherwise interfering with the owner's use or possession is a trespasser. Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240. See, also, Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 489.

168. Under the mining laws of Congress every valid location of a mining claim is accompanied by the right to the exclusive possession and enjoyment of the soil of such claim. This right is not a mere easement. Upon complying with the terms and conditions of said laws the locator may have an absolute conveyance of the property. Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

169. The right to a mining claim vests by the taking thereof in accordance with local rules. McGarrity v. Byington, 12 Cal. 426; 2 Mor. Min. Rep. 311 (1859); Dutch Flat Water Co. v. Mooney, 12 Cal. 534 (1859).

170. A right of possession comes only from a valid location. McKinstry v. Clark, 4 Mont.

370; 1 Pac. Rep. 759; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291.

171. Discovery with possession, but without location, is not valid as against a subsequent peaceable location. Horswell v. Ruiz, 67 Cal. 111; 7 Pac. Rep. 197; 15 Mor. Min. Rep. 488; Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429. *Contra*, Phenix M. & M. Co. v. Lawrence, 55 Cal. 143; 12 Mor. Min. Rep. 261.

172. Under existing legislation the owner of a mining claim has a good vested title and should be treated accordingly until the same is divested by the true owner. Merced M. Co. v. Fremont, 7 Cal. 317 (1857).

173. "A person who makes a valid location of a mineral ledge or lode, and complies with the laws and the local mining rules in respect thereto, obtains a vested right to such property, of which he cannot be divested." Blake v. Butte S. M. Co., 2 Utah, 54; 9 Mor. Min. Rep. 503.

174. Claimants under the mining laws have, as against every one but the United States, a vested right of property. Hughes v. Devlin, 23 Cal. 501; 12 Mor. Min. Rep. 241.

175. One cannot locate ground of which another is in actual possession under claim or color of right, because such ground would not be vacant and unoccupied. Eilers v. Boatman, 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462; S. C., 111 U. S. 356; 15 Mor. Min. Rep. 471.

176. Unauthorized underground working of a lode will not prevent its location by the discoverer of the apex, as "the possession of a vein recognized by the mining laws and to which protection is given, is by one who holds the surface where the vein makes its apex." Eilers v. Boatman, 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462; S. C., 111 U. S. 356; 15 Mor. Min. Rep. 471.

177. The discovery and location of a claim in pursuance of the law is equivalent to a contract of sale and purchase where the purchaser is let into possession and becomes entitled to a deed upon payment of purchase-money and making of a certain expenditure. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

178. Locators of mining claims, so long as they comply with the law, have the "exclusive right of possession and enjoyment of all the surface included within the lines of their locations." This is a right of property, and the claimant must protect himself from trespassers by proceedings in court. Lewis Smith, 1 L. D. 615.

179. Title acquired by a valid location is presumed to continue in the absence of allegation and proof to the contrary. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

180. A legally made location of a mining claim gives the locator a perfect possessory title to the claim located. Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

181. Failure to complete a location within the time allowed by State statute may be excused by the wrongful adverse possession of the claim by third persons. Erhardt v. Boaro, 2 McCrary, 141; 1 Mor. Min. Rep. 452. See 113 U. S. 537, to same effect.

182. "The object of any notice at all being to guide a subsequent locator and afford him information as to the extent of the claim of the prior locator, whatever does this fairly and reasonably, should be held a good notice. Great injustice would follow, if, years after a miner had located a claim and taken possession and worked upon it in good faith, his notice of location were to be subjected to any very nice criticism." Mt. Diablo M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

183. A location notice is not of itself evidence of legal possession, but is evidence of one step taken to acquire such possession. Thompson v. Lee, 8 Cal. 276; 1 Mor. Min. Rep. 610.

184. Proof of a legal location of a mining claim and of possession thereof is proof of such title as may be overthrown only by proof of forfeiture of the claim by failure to make the required annual expenditure thereon. Hammer v. Garfield M. & M. Co., 130 U. S. 291.

185. Locations of lodes or veins within placer claims, when perfected under the law, are the property of the locators or their assigns, and are not, therefore, subject to disposal of the government. Sullivan v. Iron Silver M. Co., 143 U. S. 431. (Citing and quoting Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510.) See 3 Mont. 65.

186. The locator of a mining claim who maintains his location has the sole right of

possession to the surface ground included therein. Atkins v. Hendree, 1 Idaho, 95; 2 Mor. Min. Rep. 328.

187. Where one of two discoverers acquired the right of the other, and erased the name of the other from the location notice, and remained in sole possession, the alteration of the notice did not amount to an abandonment of the original location. Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

188. One who locates a stone placer has title to all other minerals in the claim. Freezer v. Sweeney, 8 Mont. 508; 21 Pac. Rep. 20.

189. The fact that ground not located is used for depositing tailings by one party will not reserve it from location by another. O'Keiffe v. Cunningham, 9 Cal. 589; 9 Mor. Min. Rep. 451.

14. *Lode — Placer.*

(See VEIN and PLACER, pp. 6 and 321.)

190. The title to all veins or lodes within a placer claim, known to exist at date of the placer application for patent and not included in such application, remains in the United States, and the placer patentee or his grantees have no right to dispossess any one in the peaceable possession of such vein or lode, whether the latter have any title or not. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

191. The identity of the vein outside of the side lines with that inside the lines is essential to the possession and pursuit thereof outside such lines. So long as the inclosing walls can be distinctly and continuously traced and the mineral matter of the same character found between them, there can be no doubt that it is the same vein; but if the mineral disappears, or the fissure with its walls of the same rock disappears, the identity can no longer be traced; then the right to follow the vein outside the perpendicular lines of the survey is lost. Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

192. The question of whether or not a lode was known to exist within a placer claim at date of the application for placer patent is always one for an ultimate decision by the courts. After the Land Department has issued a patent for the placer claim its jurisdiction over the land patented has ceased, and the only way the title of the patentee can be impeached is by proper proceedings in court. Iron Silver M. Co. v. Campbell, 135 U. S. 286.

193. Where an application for patent under the lode mining laws is made for land already patented to another under the placer mining laws, the provisions of section 2326, United States Revised Statutes, do not require the placer patentee to adverse the application of the lode claimant, as only those holding mining claims by possessory title are required to proceed under that law. Iron Silver M. Co. v. Campbell, 135 U. S. 286.

194. In the case of a known lode in a placer claim at date of the placer application for patent, and not included in the placer application, the rule which applies to all actions to recover possession of real estate applies, namely, that the plaintiff can only recover on the strength of his own title, and not on the weakness of defendant's title. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

195. "The discovery by the defendant of the Dahl lode two or three hundred feet outside of those boundaries does not, as observed by the court below, create any presumption of the possession of a vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them." Dahl v. Raunheim, 132 U. S. 260.

15. *Mill Site.*

(See MILL SITE, p. 353.)

196. An applicant for patent to a mill site under the first clause of section 2337, United States Revised Statutes, must show title to the lode claim in connection with which it is claimed. Com'r to Hailey Office, July 3, 1896, *In re* Grouse Creek No. 2 Mill Site.

197. Where a mill site is located upon land claimed by a pre-emptor, the relative rights of the parties are to be determined by priority of possession. Sierra Grande M. Co. v. Crawford, 11 L. D. 338.

16. *Mines — Mining Rights.*

198. Mines belong to the owner of the soil, whether the government or a private individual. Fremont v. United States, 17 How. 542;

United States v. Castillero, 2 Black, 1; Ah Hee v. Crippen, 19 Cal. 491; 10 Mor. Min. Rep. 367; Merced M. Co. v. Boggs, 3 Wall. 304; S. C., 14 Cal. 279; 10 Mor. Min. Rep. 334; United States v. Parrott, 1 McAll. 271; Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

199. Mines of precious metals belong to the political sovereignty. Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635; 7 Op. Atty. Gen. 636.

200. Mines under Mexican laws, whether in public or private lands, belong to the supreme government. Castillero v. United States, 2 Black, 1.

201. As a general rule the public mineral lands of California are open to the occupancy of every person who, in good faith, chooses to enter upon them for the purpose of mining. Smith v. Doe, 15 Cal. 100 (1859–60).

202. The general course of legislation in California authorizes the inference of a license from her to the miner to enter upon lands and remove the gold, so far as she has any right; but this license is restricted to the public lands. Boggs v. Merced M. Co., 14 Cal. 279; 10 Mor. Min. Rep. 334 (1859–60); S. C., 3 Wall. 304.

203. There is no license from the United States, or the State of California, to miners to enter upon the private lands of individuals for the purpose of extracting the mineral in the soil. Boggs v. Merced M. Co., 14 Cal. 279; 10 Mor. Min. Rep. 334 (1859–60); S. C., 3 Wall. 304; Henshaw v. Clark, 14 Cal. 460 (1859–60).

204. The United States have not conveyed or dedicated the minerals in public land to individuals or the public. United States v. Parrott, 1 McAll. 271.

205. State legislation and judicial decisions have recognized a qualified ownership of mines in private individuals. State v. Moore, 12 Cal. 56; 14 Mor. Min. Rep. 110 (1859).

206. The statement that miners have a general license to work mines on public lands is inaccurate. Congress has adopted no specific action on the subject. The supposed license consists in the simple forbearance of the general government. Boggs v. Merced M. Co., 14 Cal. 279; 10 Mor. Min. Rep. 334 (1859–60); S. C., 3 Wall. 304.

207. Previous to 1866 a miner on public land was merely a licensee. Gottschall v. Melsing, 2 Nev. 185; 1 Mor. Min. Rep. 667.

208. Origin and general character of the laws of the miners, governing the possession of mining land prior to the act of July 26, 1866, stated and explained. Jennison v. Kirk, 98 U. S. 453. (Affirming Titcomb v. Kirk, 51 Cal. 288; 5 Mor. Min. Rep. 10.)

209. Congress recognized the possessory right of miners under the rules of the mining districts, but in doing this it has not parted with its title to the land. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183.

210. The act of July 26, 1866, is held to be a confirmation of pre-existing rights which the government had by its policy heretofore recognized. Broder v. Natoma Water & M. Co., 101 U. S. 274; 50 Cal. 621; 4 Mor. Min. Rep. 670; 5 Mor. Min. Rep. 33; Jennison v. Kirk, 98 U. S. 453. (Affirming Titcomb v. Kirk, 51 Cal. 288; 5 Mor. Min. Rep. 10.)

211. Under the act of 1866 (14 Stat. 251), the locator of a gold or silver lode is its owner against everybody except the United States, and has a mere right to purchase a pre-emption right. 420 Mining Co. v. Bullion M. Co., 3 Sawy. 634; 9 Nev. 240; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

212. Under the Spanish and Mexican laws an ordinary grant of lands by the government conveyed no title to the mine and minerals within the bounds of the tract granted. These remain a portion of the public domain. 1 Heathfield, Gamboa, 136–138; Ordinances of 1783, Title V; Halleck's Collection, pp. 222, 223; also, Title VI, Art. 14, Halleck's Collection, p. 228; Castillero v. United States, 2 Black, 1.

213. One person may own the surface and another the mine, and different persons may own different strata or minerals under the same land. Stewart v. Chadwick, 8 Clarke, 463; Adam v. Briggs Iron Co., 7 Cush. 361; Ryckman v. Gillis, 57 N. Y. 68; 15 Am. Rep. 464.

17. *Mining Claims.*

(See MINING CLAIMS, p. 1.)

214. Mining claims held by possessory title are property in the fullest sense of the word, and may be sold, transferred, mortgaged and inherited, and a location made in accordance with law has the effect of a grant by the United States of the right of present and exclusive possession. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183; Belk v. Meagher,

104 U. S. 279; 1 Mor. Min. Rep. 510; Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611; Manuel v. Wulff, 152 U. S. 505. (S. C., 9 Mont. 279; 23 Pac. Rep. 723, reversed.)

215. Mining claims are treated as real estate, although held under conditions, and may be conveyed by deed and sold on execution, and descend to the heir. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178; Atkinson v. Taylor, 7 Colo. 195; Atwood v. Fricot, 17 Cal. 38; 2 Mor. Min. Rep. 305; Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217.

216. A mining claim held under possessory title is real estate. Melton v. Lambard, 51 Cal. 258; 14 Mor. Min. Rep. 695.

217. *Possessory rights* to mining claims are property in the fullest sense of the word, and can be sold, transferred, mortgaged and inherited without infringing the title of the United States. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183; Broder v. Natoma Water & M. Co., 101 U. S. 276; 50 Cal. 621; 4 Mor. Min. Rep. 670; 5 Mor. Min. Rep. 33; Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510. (See 3 Mont. 65.) Sullivan v. Iron Silver M. Co., 143 U. S. 431.

218. In California claims to public mineral lands are recognized as titles—as legal estates of freehold for all practical purposes. Merritt v. Judd, 14 Cal. 59 (1859-60); Hughes v. Devlin, 23 Cal. 501; 12 Mor. Min. Rep. 241.

219. The interest of a decedent in a mining claim held under possessory right descends to his heirs. Keeler v. Trueman, 15 Colo. 143; 25 Pac. Rep. 311.

220. The statutes of Montana which regulate the descent and distribution of real property are applicable to quartz lodes. Carhart v. Montana Mineral, etc., 1 Mont. 245.

221. Where all the rules, laws, regulations and customs with reference to a mining claim have been complied with, a property right, prior to the issuance of patent, has been acquired that can be transferred or inherited. Suessenbach v. First National Bank, 5 Dak. 477; 41 N. W. Rep. 662.

222. A mining claim is property and may be sold. Suessenbach v. First National Bank, 5 Dak. 477; 41 N. W. Rep. 662.

223. Possessory title to a mining claim is such property as may be sold on execution. McKeon v. Bisbee, 9 Cal. 137; 2 Mor. Min. Rep. 309.

224. Possessory title to a mining claim is not such a title as may be made the subject of a bill for partition, unless so provided by a State statute, in which case the bill should be filed in a State court. Strettell v. Ballou, 3 McCrary, 46.

225. The right to a mining claim held by a possessory title is such property as may be made the subject of partition. Gillett v. Gaffney, 3 Colo. 351; Sears v. Taylor, 4 Colo. 38; Filmore v. Reithman, 6 Colo. 124; McKeon v. Bisbee, 9 Cal. 137; 2 Mor. Min. Rep. 309; Watts v. White, 13 Cal. 324; Merritt v. Judd, 14 Cal. 59; Lowe v. Alexander, 15 Cal. 302; Hughes v. Devlin, 23 Cal. 501; 12 Mor. Min. Rep. 241; Spencer v. Winselman, 42 Cal. 479; Dall v. Confidence S. M. Co., 3 Nev. 531; Aspen M. & Sm. Co., 28 Fed. Rep. 220 (Colo.).

226. Possessory title to a mining claim is property which may be shown to have sufficient value to entitle the claimant to appeal. Sparrow v. Strong, 3 Wall. 97; 2 Mor. Min. Rep. 320.

227. The same rules of law relating to estoppel *in pais* apply to mining ground as any other real estate claimed under a similar kind of title. Kelley v. Taylor, 23 Cal. 11 (1863).

18. *Possession.*

228. Mere possession of mineral land, not based on a location, is good title as against a mere intruder, but not against one who has made a location of the land in the manner prescribed by law, and the possession of such a locator may prevail over such prior possession. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65; Sparks v. Pierce, 115 U. S. 408; Chapman v. Toy Long, 4 Sawy. 28; 1 Mor. Min. Rep. 497; Atwood v. Fricot, 17 Cal. 37; 2 Mor. Min. Rep. 75; English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202; Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217; Morenhaut v. Wilson, 52 Cal. 263; 1 Mor. Min. Rep. 53; Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341; Horswell v. Ruiz, 67 Cal. 111; 7 Pac. Rep. 197; 15 Mor. Min. Rep. 488; Garthe v. Hart, 73 Cal. 541; 15 Pac. Rep. 93; 15 Mor. Min. Rep. 492; Neuebaumer v. Woodman, 89 Cal. 310; 26 Pac. Rep. 900; Golden Fleece G. & S. M. Co. v. Cable Cons.

M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; Noyes v. Black, 4 Mont. 527; 2 Pac. Rep. 769; Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291; Patterson v. Tarbell, 26 Oreg. 29; 37 Pac. Rep. 76; McCornick v. Varnes, 2 Utah, 355; 9 Mor. Min. Rep. 505.

229. Possession and occupancy of public lands for the purpose of working a stone quarry thereon confer no rights as against the United States or others having a valid claim under its laws. Keller v. Bullington, 11 L. D. 140.

230. Possession of a mining claim, to be of effect, must be that arising from a compliance with the law. Possession without location carries no title, nor does possession under a location which has not properly been maintained. "The mere naked possession of a mining claim upon the public lands is not sufficient to hold such claim as against a subsequent location, made in pursuance of the law, and kept alive by compliance therewith." Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287; Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510. (See 3 Mont. 65.) Patterson v. Tarbell, 26 Oreg. 29; 37 Pac. Rep. 76; Sweet v. Webber, 7 Colo. 443; 4 Pac. Rep. 752; 4 West Coast Rep. 116.

231. The right to the exclusive possession of mineral land not actually held in *possessio pedis* may be acquired only by a legal location thereof. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304. (Second trial, 17 Colo. 248; 29 Pac. Rep. 173.)

232. Prior possession without location is good as against one subsequently taking possession in the same way. English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202.

233. Entering upon premises in the actual possession of another, for the purpose of performing the acts necessary to constitute location and possession, amounts only to trespass, and cannot form the basis for the acquisition of title. Lebanon M. Co. v. Consolidated Republican Mtn. M. Co., 6 Colo. 380; Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

234. Occupancy of land for mining purposes will prevent a valid location thereof. Armstrong v. Lower, 6 Colo. 581; 15 Mor. Min. Rep. 458. (Affirming 6 Colo. 693; 15 Mor. Min. Rep. 681.)

235. Actual possession and occupation of mineral land for mining purposes, even though not under a valid location, will preserve the land so possessed and occupied from location by another. North Noonday M. Co. v. Orient Co., 6 Sawy. 299–503; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

236. Mere possession of a mining claim, whether based on a valid location or not, will prevent a valid location thereof by other parties. Weise v. Barker, 7 Colo. 178; 2 Pac. Rep. 919; 2 West Coast Rep. 108.

237. Possession is not equivalent to location. Garfield M. & M. Co. v. Hammer, 130 U. S. 291. See S. C., 6 Mont. 53; 8 Pac. Rep. 158.

238. Two kinds of possession of mining ground are recognized: 1st. That of mere actual occupation independent of a location, which is good as against one having no better title. 2d. That given by compliance with the law regarding location. In the first, the occupation must be an actual *possessio pedis;* in the second it may be constructive. Armstrong v. Lower, 6 Colo. 581; 15 Mor. Min. Rep. 458. (Affirming 6 Colo. 393; 15 Mor. Min. Rep. 458.)

239. Mere possession of mineral lands not based on a location is good as against one having no better title, but such possession must be actual and will not extend constructively to the full extent of a mining claim. Zollars & Highland Chief Cons. M. Co. v. Evans, 2 McCrary, 39; 5 Fed. Rep. 172; 4 Mor. Min. Rep. 407.

240. In actions of ejectment or trespass, possession by plaintiff has always been held *prima facie* evidence of the legal title, and as against a mere trespasser it is sufficient. Campbell v. Rankin, 99 U. S. 261; 12 Mor. Min. Rep. 257. (Citing 2 Greenl. Ev., sec. 311; Atwood v. Fricot, 17 Cal. 37; 2 Mor. Min. Rep. 305; English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202; Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217.)

241. Mere possession of a mining claim will be protected as against one having no better title. Patchen v. Keeley, 19 Nev. 404; 14 Pac. Rep. 347; Crossman v. Pendery, 2 McCrary, 139; 8 Fed. Rep. 693; 1 Colo. Law Rep. 496; 4 Mor. Min. Rep. 431; English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202.

242. One in the actual possession of real estate may rely on possession alone until his

adversary shows a better title. Hawxhurst v. Lander, 28 Cal. 331; 12 Mor. Min. Rep. 214; Iron Silver M. Co. v. Cheesman, 116 U. S. 529.

243. Actual possession is good title as against one who has not made a valid location. Gregory v. Pershbaker, 73 Cal. 109; 14 Pac. Rep. 401; 15 Mor. Min. Rep. 602.

244. Mere possession of mining ground without location is good as against an intruder who made no location. Neuebaumer v. Woodman, 89 Cal. 310; 26 Pac. Rep. 900.

245. One in the actual possession of land as a mining claim has good title as against one who does not show title acquired by compliance with the law and the mining rules of the district. Shafer v. Constans, 3 Mont. 369; 1 Mor. Min. Rep. 147.

246. Possession is sufficient to maintain trespass or ejectment against a stranger, but not against one who has the right of possession. Noyes v. Black, 4 Mont. 527; 2 Pac. Rep. 769.

247. Possession of mineral lands is good against strangers except where held for grazing, and entered upon for mining purposes (prior to 1866). Lentz v. Victor, 17 Cal. 271; Rupley v. Welch, 23 Cal. 453.

248. In possessory actions proof of possession of a mining claim is *prima facie* evidence of title. Patchen v. Keeley, 19 Nev. 404; 14 Pac. Rep. 847; Lebanon M. Co. v. Cons. Republican Mtn. M. Co., 6 Colo. 380; Sears v. Taylor, 4 Colo. 38; Funk v. Sterrett, 59 Cal. 613; Noyes v. Black, 4 Mont. 527; 2 Pac. Rep. 769.

249. Possession constitutes of itself title. Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188; 1 Mor. Min. Rep. 17.

250. Possession of itself is property. Brennan v. Gaston, 7 Mor. Min. Rep. 426.

251. Payment of taxes by the adverse possessor is essential to the obtaining of title by adverse possession. Tuffree v. Polhemus, 108 Cal. 670.

252. It is presumed in the absence of evidence that parties in possession of mining claims hold them according to the rules and customs of the miners in the district. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

253. The law does not make actual possession necessary for the protection of the title acquired by a valid location. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65.

254. After a legal location, neither a continuous actual occupation, nor a *possessio pedis*, are necessary to obtain possessory title. Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 663; English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202.

255. Actual possession of a portion of a mining claim, according to the custom of miners in a given locality, extends by construction to the limits of the claim held in accordance with such custom. Hicks v. Bell, 3 Hepburn, 220 (1853).

256. A mining claim on the public domain may be held by occupancy and exercising control by marking the boundaries by monuments, or by occupancy in accordance with local mining customs. Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217 (1865).

257. One attempting to hold by prior possession without reference to local mining customs must give notice to others by actual physical marks or monuments. If this is not done, he can only hold to the extent of the land actually occupied and worked, as against others. Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217 (1865).

258. The physical marks sufficient to serve as notice of the possession of a mining claim must be sufficient to be found by one honestly concerned to discover whether the land has been previously appropriated for mining purposes. Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217 (1865).

259. When a claim is distinctly marked, possession covers the whole claim thus marked. English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202.

260. A party claiming mining ground not actually possessed, and beyond the *possessio pedis*, must show his right thereto by constructive possession, and he can show such constructive possession only by physical works and monuments, or by local mining laws and rules, and compliance therewith. Roberts v. Wilson, 1 Utah, 292; 4 Mor. Min. Rep. 498.

261. Posting a notice on a five-sided tract claimed for mining, and marking three of its corners, in the absence of any mining district rule is not a valid or sufficient location or possession. Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217 (1865).

262. Actual *occupation* in person or by agent is not essential to constitute possession. Cultivating or working is sufficient. Quicksilver M. Co. v. Hicks, 4 Sawy. 688; 11 Mor. Min. Rep. 98.

263. Possession is sufficient to maintain title during the period necessary to perfect the location. Erhardt v. Boaro, 113 U. S. 527: 4 Mor. Min. Rep. 432; Crossman v. Pendery, 2 McCrary, 139; 8 Fed. Rep. 693; 1 Colo. Law Rep. 496; 4 Mor. Min. Rep. 431.

264. Mining claims are held by possession regulated by usage. Atwood v. Fricot, 17 Cal. 37; 2 Mor. Min. Rep. 305.

265. Where the title of the respective claimants to public land is based upon possession alone, the older possession gives the better right, whether for agricultural or mining purposes. Gibson v. Puchta, 33 Cal. 311 (1867).

266. As between two conflicting locations, both defective, the prior locator has the superior right of possession, and may enforce it in an action of trespass. Neuebaumer v. Woodman, 89 Cal. 310; 26 Pac. Rep. 900.

267. In questions involving the right of possession, proof of prior occupancy, and especially when accompanied by a deed showing color of right, should not be rejected by the court. Campbell v. Rankin, 99 U. S. 261; 12 Mor. Min. Rep. 257.

268. The actual possession of a miner is not restricted to his *possessio pedis*. Atwood v. Fricot, 17 Cal. 37; 2 Mor. Min. Rep. 305.

269. The acts required as evidence of possession of mining claims are those usually done. A miner may hold possession by his agents or servants. English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202; Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 411; 4 West Coast Rep. 663.

270. Long-continued undisputed possession of a mining claim may raise the presumption that it was based upon a valid location. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178; Atwood v. Fricot, 17 Cal. 38; 2 Mor. Min. Rep. 305; Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217.

271. The possession of mineral lands is separable from the fee. Congress provided for the existence of an exclusive right to the possession, while the paramount title remains in the United States. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510. See S. C., 3 Mont. 65.

272. Possession and right and power to purchase are inseparable. Tibbitts v. Ah Tong, 4 Mont. 536.

273. The owner of a mining claim may continue to hold his claim under possessory title, and need never make entry therefor if he does not wish to do so. Black v. Elkhorn M. Co., 52 Fed. Rep. 859.

274. Valid possession shown is presumed to continue. Gropper v. King, 1 Pac. Rep. 755.

275. A preference right to purchase coal land depends upon priority of possession and improvement, followed by proper filing and development. Bullard v. Flanagan, 11 L. D. 515; Walker v. Taylor, 23 L. D. 110.

276. An applicant to make entry of coal lands under section 2348 of the United States Revised Statutes must be in actual possession of the land, and it is not sufficient to show a forcible ouster therefrom. James D. Negus, 11 L. D. 32.

277. No one out of possession can make a mining application. Andrew M. Embry, 7 C. L. O. 5.

278. Occupation distinguished from possession. Dallas City v. Missionary Society, 6 Sawy. 126; Quicksilver M. Co. v. Hicks, 4 Sawy. 688; 11 Mor. Min. Rep. 98.

279. Proof of domestic occupation is not evidence of possession as mineral ground. Moxon v. Wilkinson, 2 Mont. 421; 12 Mor. Min. Rep. 602.

280. Where a mining claim is located upon an Indian reservation and the locator is in possession at the date the reservation is thrown open, "with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, he could, by adopting what had been done, causing a proper record to be made, and performing the amount of labor or making the improvement necessary to hold the claim, date his rights from that day; and that such location and labor and improvements would give him the right of possession." Noonan v. Caledonia M. Co., 121 U. S. 393. (Affirming 3 Dak. 189; 14 N. W. Rep. 426.)

281. Judgment for possession of a lode does not necessarily carry rights to the sur-

face ground. (Prior to 1866.) Bullion M. Co. v. Croesus G. & S. M. Co., 2 Nev. 168; 5 Mor. Min. Rep. 254.

282. The question of possession of mining claims under the California law, rules and customs discussed. Atwood v. Fricot, 17 Cal. 37; 2 Mor. Min. Rep. 305 (1860-61); English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202 (1860-61).

283. Actual possession of a mining claim defined, instanced or illustrated. Kelly v. Natoma Co., 1 Mor. Min. Rep. 592; Courtney v. Turner, 12 Nev. 345; Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 668.

284. What constitutes possession is a question of law for the court. Thistle v. Frostburg Co., 10 Md. 129.

19. *Statute of Limitations.*

(See PATENT and STATUTE OF LIMITATIONS, pp. 275 and 333.)

285. Title to land under the Statute of Limitations must be based on possession for the prescribed period after issuance of patent. McTarnahan v. Pike, 91 Cal. 540.

286. Until patent issues, legal title to land entered is in the United States; therefore, a town lot owner claiming adversely to a mining claimant cannot set up the Statute of Limitations as having begun to run before the issuance of patent on the mining claim. King v. Thomas, 12 Pac. Rep. 865; Mayer v. Carrothers, 36 Pac. Rep. 182.

287. Plaintiff on adverse suit cannot recover if defendant proves possession of the claim during the period prescribed by the State Statute of Limitations. 420 Mining Co. v. Bullion M. Co., 3 Sawy. 634; 9 Nev. 240; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

288. Adverse possession for the time limited by the Statute of Limitations vests a perfect title in the adverse holder, which title may be quieted in his favor by a bill in equity. 420 Mining Co. v. Bullion M. Co., 3 Sawy. 634; 9 Nev. 240; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

289. No rights can be acquired by adverse possession under the Statute of Limitations by sinking on the dip of the vein, without the knowledge of the owner of the apex. Pardee v. Murray, 4 Mont. 234; 2 Pac. Rep. 16; 15 Mor. Min. Rep. 515.

290. Possession under color of title for the period prescribed by the Statute of Limitations presumed, and an adverse location made during such possession held invalid. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178.

291. The Statute of Limitations may give the possessor of a mining claim good title as against other claimants. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178.

292. When placer claims are applied for, and title is based on the Statute of Limitations, an expenditure of $500 is not required on the claims. J. P. Sears, 8 C. L. O. 152.

293. The Statute of Limitations does not obviate the necessity of publishing and posting notices of application for patent. Com'r to Smith Bros., Sept. 20, 1879, 7 C. L. O. 4.

20. *Suit.*

(See ADVERSE and SUIT, pp. 284 and 445.)

294. In an action not under section 2326, United States Revised Statutes, a general allegation of ownership of the mining claim in the complaint is sufficient. Donahue v. Johnson, 9 Wash. St. 187; Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 183.

295. An adverse claimant to a placer mine who has executed an instrument by which he agrees to convey the premises in dispute, at some future time, to a tenant in possession, may, under the code of Montana, and sections 2325 and 2326, United States Revised Statutes, maintain an action in the courts of Montana to determine the right of possession of the premises in dispute. Wolverton v. Nichols, 119 U. S. 485. See S. C., 2 Pac. Rep. 303; 15 Mor. Min. Rep. 309.

296. Suit may be brought to quiet title on the ground of fraud after a mineral entry has been made. Lee v. Justice M. Co., 29 Pac. Rep. 1020.

297. In an action to recover possession of a mining claim, plaintiff must prove some title superior to that of defendant by a preponderance of evidence, but need not prove his right to a patent. Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795.

298. Plaintiff, who brings an action to recover possession of a mining claim, must show

a good location. Terrible M. Co. v. Argentine M. Co., 5 McCrary, 639.

299. An applicant for a placer patent, who has given due notice thereof and made entry, may maintain a suit to quiet title against one claiming under a conflicting lode location. Dahl v. Raunheim, 132 U. S. 260.

300. When plaintiff's ownership and right of possession are put in issue by answer, he must show affirmatively a compliance with the act of Congress and local rules and regulations, and that he had thereby made a valid location. Garfield M. & M. Co. v. Hammer, 130 U. S. 291. See S. C., 6 Mont. 53; 8 Pac. Rep. 153.

301. It is a general rule of law that a certificate of entry, like a patent, is conclusive of legal title, but this rule will not be followed where entry was made by defendant in an adverse suit, after the dismissal of such suit, where the suit was thereafter reinstated, and the cause will be tried as though it had never been dismissed. McEvoy v. Hyman, 25 Fed. Rep. 539; 15 Mor. Min. Rep. 300.

21. *Town Site.*

(See TOWN SITE, p. 451.)

302. "Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed, and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States." (Sec. 2386, U. S. Rev. Stat.) "No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession." (Sec. 2392, U. S. Rev. Stat.) "Thus read they must be held, we think, merely to prohibit the passage of title under the provisions of the Town Site Laws, to mines of gold, silver, cinnabar, or copper, which are known to exist, on the issue of the town site patent, and to mining claims and mining possessions, in respect to which such proceedings have been taken under the law or the custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The exceptions of mineral lands from pre-emption and settlement and for grants to States for universities and schools, for the construction of public buildings and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining States which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral' in the sense of this statute is applicable." Davis' Adm'r v. Weibbold, 139 U. S. 507. (Citing and approving Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348; Cowell v. Lammers, 10 Sawy. 246; 21 Fed. Rep. 200; 3 West Coast Rep. 504; United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486; Alford v. Barnum, 45 Cal. 482; 10 Mor. Min. Rep. 422; Merrill v. Dixon, 15 Nev. 401; Dughi v. Harkins, 2 L. D. 721; Cleghorn v. Bird, 4 L. D. 478; Commissioner of Kings County v. Alexander, 5 L. D. 126; Samuel W. Spong, 5 L. D. 193; Magalia G. M. Co. v. Ferguson, 6 L. D. 218; Nicholas Abercrombie, 6 L. D. 393; John Downs. 7 L. D. 71; Cutting v. Reininghaus, 7 L. D. 265; Creswell M. Co. v. Johnson, 8 L. D. 440; Thomas J. Laney, 9 L. D. 83.)

303. Where the applicant for patent for a lode claim situate within a patented town site shows such lode to have been known at the date of the town site entry, he may procure a reconveyance of the conflict by the town site to the United States, and thus reinvest the Land Department with jurisdiction to patent the claim. Pederson Lode v. Black Hawk Town Site, 14 L. D. 186.

304. As sections 2386 and 2392, United States Revised Statutes, provide that no title shall be acquired under the town site laws to known mines or to valid mining claims or possessions, if it is shown that a mine or valid mining claim was known within a town site at date of the town site entry, patent may issue therefor, as title thereto never passed from the United States. (Following principle of South Star Lode, 20 L. D. 204.) Com'r to Denver Office, Nov. 16, 1895, *In re* Antediluvian Lode; Town Site of Butte, 3 C. L. O. 114–131.

22. *Trespass.*

(See TRESPASS, p. 454.)

305. A *possessio pedis* of mining land is good as against a mere trespasser, but, in the absence thereof, claimant must show a legal location to succeed in a suit against a trespasser. Funk v. Sterrett, 59 Cal. 613.

306. In an action of trespass on a mining claim, plaintiff need show only that he has possession, unless defendant shows some sort of title superior to that of mere possession. Courchainer v. Bullion M. Co., 4 Nev. 369; Patchen v. Keeley, 19 Nev. 404; 14 Pac. Rep. 347.

307. To support an action of trespass, personal possession on the ground (*possessio pedis*) is not necessary. McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076; Neuebaumer v. Woodman, 89 Cal. 310; 26 Pac. Rep. 900.

308. Entry on land of another under assertion of title is an ouster, otherwise a mere trespass. West v. Lanier, 9 Humphreys, 762; 12 Mor. Min. Rep. 184.

309. A mine owner holding under possessory right in compliance with law may maintain an action of trespass against one who removes timber from the claim. McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076.

310. The complaint in a mere action of trespass need only allege in general terms ownership in the mining property. Allegations of location, etc., are not required. McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076.

23. *Water Rights.*

(See WATER RIGHTS, p. 860.)

311. The common-law doctrine that prior appropriation of water of a stream by a riparian proprietor confers no exclusive right to the use of it as against another riparian proprietor, unless the latter's rights are impaired by grant or license, or the prior appropriation has continued adversely for more than twenty years, has been modified by local usage and by statutory enactment (Palmer v. Mulligan, 3 Caines, 307; Platt v. Johnson, 15 Johns. 213; Martin v. Bigelow, 2 Aikens, 184; S. C., 16 Am. Dec. 696; Hoy v. Sterrett, 2 Watts, 327; S. C., 27 Am. Dec. 313; Stout v. McAdams, 2 Scam. 67; S. C., 33 Am. Dec. 441; Davis v. Fuller, 12 Vt. 178; S. C., 36 Am. Dec. 334; Evans v. Merriweather, 3 Scam. 492; S. C., 38 Am. Dec. 107; Hartzall v. Sill, 12 Pa. St. 248; Bliss v. Kennedy, 43 Ill. 67; Rudd v. Williams, 43 Ill. 385; Gilman v. Tilton, 5 N. H. 231; Cowles v. Kidder, 24 N. H. 378; Stillman v. W. R. etc. Co., 3 Wood. & M. 550; Parker v. Hotchkiss, 25 Conn. 321; Keeney, etc. Mfg. Co. v. Union Mfg. Co., 39 Conn. 576; Tyler v. Wilkinson, 4 Mason, 397; Pugh v. Wheeler, 2 Dev. & B. 55; Blanchard v. Baker, 3 Greenl. 504; S. C., 23 Am. Dec. 504; Wadsworth v. Tillitson, 15 Conn. 356; S. C., 39 Am. Dec. 391), and does not prevail in California and some other of the mining States and Territories. In those States property in a stream of water on the public lands may be acquired by mere appropriation for mining or other useful purposes, as for irrigation or for the operation of mills, and the first appropriator is, to the extent of his appropriation, the owner as against all the world except the government (Lobdell v. Simpson, 2 Nev. 274; Ophir S. M. Co. v. Carpenter, 4 Nev. 534; Barnes v. Sabron, 10 Nev. 217; 4 Mor. Min. Rep. 673; Strait v. Brown, 16 Nev. 317; S. C., 40 Am. Rep. 497; Hill v. Newman, 5 Cal. 445; Kelly v. Natoma Water Co., 6 Cal. 107; Hoffman v. Stone, 7 Cal. 46; Hill v. King, 8 Cal. 336; Bear River, etc. Co. v. N. Y. Mining Co., 8 Cal. 327; McDonald v. Bear River, etc. Co., 13 Cal. 220; Kidd v. Laird, 15 Cal. 161; Ortman v. Dixon, 13 Cal. 33; Phœnix Water Co. v. Fletcher, 23 Cal. 481; Wixon v. Bear River, etc. Co., 24 Cal. 367; Hill v. Smith, 24 Cal. 480; Parks Canal, etc. Co. v. Hoyt, 57 Cal. 44; Crane v. Winsor, 2 Utah, 248; Schillinger v. Rominger, 4 Colo. 100), and such rights have been confirmed by Congress. Note to Castillero v. United States, 2 Black, 1; Act of July 26, 1866 (14 Stat. 253).

312. The doctrine as to water rights, etc., under the act of July 26, 1866, applies only to public lands. No rights can be acquired thereunder where the title to the lands upon which the stream is situated has passed from the government, but the owner of the land is the owner of the stream, and the common-law rule prevails. Union Mtn. M. Co. v. Ferris, 2 Sawy. 176; 8 Mor. Min. Rep. 90; Van Sickle v. Haines, 7 Nev. 249. (Overruled in Jones v. Adams, 19 Nev. 78.) Crandall v. Woods, 8 Cal. 136; Leigh v. Independent Ditch Co., 8 Cal. 323.

313. A water right may be lost by the adverse possession of another; but in such cases non-user by the owner, and adverse possession by another, for a period equal to that fixed by the statutes of limitation relating to real property, are necessary to divest title. Wimer v. Simmons, 27 Oreg. 1; 39 Pac. Rep. 6.

314. Under the act of July 26, 1866 (14 Stat. 253), section 2339, United States Revised Statutes, no title is acquired to a right of way for a ditch until actual possession is taken. Bybee v. Oregon & California R. R. Co., 139 U. S. 663.

315. An owner of a mining claim and the owner of a water right in California hold their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed. Jennison v. Kirk, 98 U. S. 453. (Affirming Titcomb v. Kirk, 51 Cal. 288; 5 Mor. Min. Rep. 10.) NOTE.— Justice Field, in a note appended to the opinion as published, states "that the customary law of miners is not applicable in California to controversies arising between them or ditch owners, and occupants of the public lands for agricultural or grazing purposes. It has been the general policy of the State to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner. Tartar v. Spring Creek Co., 5 Cal. 398. But at an early day an exception was made to this policy in cases where the interests of agriculturalists and of miners conflicted. By an act passed April 20, 1852, a right of action was given to any one settled upon the public lands for the purpose of cultivating or grazing against parties interfering with his premises, or injuring his lands where the same were designated by distinct boundaries, and did not exceed one hundred and sixty acres in extent: with a proviso, however, that if the lands contained mines of precious metals the claim of the occupant should not preclude any persons desiring to do so from working the mines as fully and unreservedly as they might or could do had no possession or claim been made for grazing or agricultural purposes. Stat. at L., 1852, p. 158. Under this act the Supreme Court of the State held that miners, for the purpose simply of mining, could enter upon the land thus occupied, but that the act legalized what would otherwise have been a trespass, and could not be extended by implication to a class of cases not specifically provided for. Accordingly, ditches thus constructed over lands thus held, without the consent of the occupant, though designed to convey water to mining localities for the purpose of mining, were held to be nuisances, and upon the complaint of the occupant were ordered to be abated. Stokes v. Barrett, 5 Cal. 37; McClintock v. Bryden, 5 Cal. 97; Fitzgerald v. Urton, 5 Cal. 308; Burdge v. Underwood, 6 Cal. 46; Weimer v. Lowery, 11 Cal. 104.

24. *Work.*

(See EXPENDITURE, p. 224.)

316. The laws and customs which point out the manner of locating mining claims are conditions precedent to the right to possess and mine a claim; and no such right can be acquired until such conditions precedent have been complied with. The requirements as to performance of annual labor, however, are conditions subsequent, the mere breach of which is not, *per se*, sufficient to cause a forfeiture, which must result from entry by the grantor (the United States), or one claiming under it, *i. e.*, a relocation of the claim under the mineral land laws. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

317. A locator's only right to possession of a mining claim is conditional upon the performance annually of the required amount of labor; and if such labor is not performed the ground is subject to relocation under section 2324, United States Revised Statutes, and the occupation of the ground by the original owner will not prevent relocation. Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341. (Refusing to follow Eilers v. Boatman, 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462; Weise v. Barker, 7 Colo. 178; 2 Pac. Rep. 919; 2 West Coast Rep. 108.)

318. Improvements made by trespassers upon a mining claim may not be purchased by a claimant after suit brought to determine the right of possession, and considered as having been made, originally, by claimant. Little Gunnell M. Co. v. Kimber, 1 Mor. Min. Rep. 536.

319. A party making annual expenditures on one of two claims held in common for the benefit of the claim involved is not bound to prove record title to the location on which work was done, having shown possession. De Noon v. Morrison, 83 Cal. 163; 23 Pac. Rep. 374.

320. The title of a successful plaintiff in an adverse suit is a possessory one, and may be lost by failure to make the required expenditure followed by relocation by a third person. Com'r to Leadville Office, Feb. 24, 1896, *In re* Kennedy v. Johnston.

321. Work done on a claim by one holding the equitable title thereto is as effectual to maintain the location as if done by the legal owner. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Book v. Justice M. Co., 58 Fed. Rep. 106.

322. Wrongful adverse possession relieves the owner from the necessity of performing assessment work, so far as the adverse possessor is concerned. Utah M. & Mfg. Co. v. Dickert & Myers Sulphur Co., 6 Utah, 183; 21 Pac. Rep. 1002.

323. The owner of a placer mining claim does not forfeit his right thereto, so as to render it subject to relocation, by a failure to perform the annual assessment work during the time when adverse possession is held by another, where he commences action for its recovery within the statutory time. Trevaskis v. Peard, 44 Pac. Rep. 246 (Cal.).

25. *General.*

324. No two or separate estates (of surface ground and of lode, wherever the latter might be found to run in its course, without regard to surface ground) are recognized by the act of July 26, 1866. McCornick v. Varnes, 2 Utah, 355; 9 Mor. Min. Rep. 505.

325. The fee in the land on which mining claims are located remains in the United States; but the rights of miners are incident to the fee and have been carved out of it. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

326. Questions as to entryman's title may be raised before the Land Department by a protestant as *amicus curiæ*. Bradstreet v. Rehm, 21 L. D. 544 (on review).

327. One having no title to a mining claim will not be heard to attack the title of another thereto. Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

328. The title of a mineral claimant may be questioned only by one claiming adversely. Lorenz v. Waldron, 96 Cal. 243; 31 Pac. Rep. 54.

329. One who bases his title upon the forfeiture of the claim of another has the burden of clearly establishing such forfeiture. Hammer v. Garfield M. & M. Co., 130 U. S. 291; Oreamuno v. Uncle Sam G. & S. M. Co., 1 Nev. 215; 1 Mor. Min. Rep. 32.

330. The exclusion from entry and patent of a mining claim of conflict with another claim does not preclude the patentee from holding the excluded ground under his possessory title and raises no presumption against such title. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

331. An applicant for a mineral patent may make entry of his claim exclusive of land covered by an adverse claim and take patent for the land not in conflict, without waiving his possessory right to the excluded portion. Black Queen Lode v. Excelsior No. 1 Lode, 22 L. D. 343.

332. The moment mineral or ore becomes detached from the soil of the public lands in which it is imbedded, it becomes personal property, the ownership in which is in the man whose labor, capital and skill has discovered and developed the mine and extracted the ore. It is then free from any lien, claim or title of the United States, and is rightfully subject to taxation by the State as any other personal property is. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183.

333. A corporation some of the stockholders of which had exhausted their rights under the coal land laws procured various persons individually qualified to make entry of coal lands for the purpose of transferring title acquired by such entry to the corporation. *Held*, that the transaction was in violation of the law governing the disposal of public lands containing coal, and that patents so obtained were voidable for fraud in their procurement. United States v. Trinidad Coal & Coking Co., 137 U. S. 160. (Reversing S. C., 37 Fed. Rep. 180.)

334. There can be no color of title in an occupant who does not hold under any instru-

ment or law purporting to transfer to him the title or give to him the right of possession. Deffeback v. Hawke, 115 U. S. 392.

335. Where, in payment for a mining claim held by possessory title, notes are given, the maker cannot object when they fall due that subsequent to the purchase the claim was abandoned. The grantor sold only a possessory title, and the duty of maintaining the claim fell upon the grantee. Corbett v. Berryhill, 29 Iowa, 157; 14 Mor. Min. Rep. 671.

336. The owners of a mining claim holding by possessory right may not, after mortgaging the same, *abandon* the claim and allow it to be relocated, and thereby defeat the mortgage. (In this case, however, though there was an attempted *abandonment*, there was no *forfeiture*, as annual labor was performed by the mortgagors during the year of relocation.) Alexander v. Sherman, 16 Pac. Rep. 45; 15 Mor. Min. Rep. 638. See Saunders v. Mackey, 5 Mont. 528; 6 Pac. Rep. 361.

337. Continuous possession and performance of annual assessment work are sufficient to disprove the charge of abandonment. Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 183.

338. Possessory title to a mining claim is such property as is subject to taxation by the State. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183; State v. Moore, 12 Cal. 56; 14 Mor. Min. Rep. 110; Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Hale & Norcross G. & S. M. Co. v. Story County, 1 Nev. 104; 14 Mor. Min. Rep. 115.

339. Possessory title to a mining claim may not be held by a State or Territory, as it is not one of the persons named in section 2325, United States Revised Statutes. Territory v. Lee, 2 Mont. 124; 6 Mor. Min. Rep. 248.

340. The United States cannot enter upon nor authorize an entry upon private property for the purpose of extracting minerals. Boggs v. Merced M. Co., 14 Cal. 279; 10 Mor. Min. Rep. 334 (1859–60); S. C., 3 Wall. 304.

341. Mining of a claim may be temporarily restrained pending a settlement of a controversy as to title in a court of law. Bishop v. Baisley, 41 Pac. Rep. 936.

342. One holding a mining claim by possessory title may remove timber therefrom when necessary for mining purposes, but not for the purpose of sale. United States v. Nelson, 5 Sawy. 68; 14 Mor. Min. Rep. 381.

343. While the general rule is that the decisions by the Land Department on questions of fact preliminary to the issuance of a patent are conclusive after the issuance of patent, "where each party has a patent from the government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, we think it is competent, in any judicial proceedings where this question of superiority of title arises, to establish it by proof of those facts." Iron Silver M. Co. v. Campbell, 135 U. S. 286.

344. One who was the owner of a vein prior to May 10, 1872, and who was in possession thereof at said date, has the right to follow his vein within the patented surface ground of another on its dip. Blake v. Butte S. M. Co., 2 Utah, 54; 9 Mor. Min. Rep. 503.

345. Prior to the act of 1866 no right to a mining claim could be acquired as against the United States. Lee Doon v. Tesh, 68 Cal. 43; 8 Pac. Rep. 621.

346. One whose title is declared bad under one mining location may relocate the claim and base his title on such relocation. Meyendorf v. Frohner, 3 Mont. 282; 5 Mor. Min. Rep. 559.

347. The supreme court does not interfere with the title of a patentee on an alleged mistake of fact, or from wrong conclusions drawn from the testimony by the Land Department. It is only a case of fraud that will warrant a court in looking into the evidence. Lee v. Johnson, 116 U. S. 48.

348. The rejection by the Land Department of an application for patent to a mining claim cannot affect the possessory right of the applicant. Clipper M. Co., 22 L. D. 527.

349. Where the owner of a mining claim, which was erroneously included in a sale under a decree of court, moved his effects from the claim and absented himself for two years, allowing the purchasers to work it without objection, while knowing that their title was invalid, and intending to claim it only in case their development rendered it profitable to do so, his acts will constitute an abandonment. Trevaskis v. Peard, 44 Pac. Rep. 246 (Cal.).

PUBLICATION.

I. THE STATUTE.
II. REGULATIONS.
III. DECISIONS.

I. THE STATUTE.

(See sec. 2325, U. S. Rev. Stat., p. 137.)

II. REGULATIONS.

34. Upon the receipt of these papers the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a *weekly* newspaper ten consecutive insertions are necessary; when in a *daily* newspaper the notice must appear in each issue for sixty-one consecutive issues, the first day of issue being excluded in estimating the period of sixty days.

35. The notice so published and posted must be as full and complete as possible, and embrace all the *data* given in the notice posted upon the claim.

36. Too much care cannot be exercised in the preparation of these notices, inasmuch as upon their accuracy and completeness will depend, in a great measure, the regularity and validity of the whole proceeding.

37. In the publication of final-proof notices the register has *no discretion* under the law to designate any other than the newspaper "nearest the land" for such purpose when such paper is a newspaper of general circulation. But he will in all cases designate the newspaper of general circulation that is published nearest the land, geographically measured. When two or more such newspapers are published in the same town, nearest the land, he may select the one which, in his honest and impartial judgment as a public officer, will best subserve the purpose of the law and the general interests of the public.

38. Newspaper charges must not exceed the rates established by this office for the publication of legal notices.

41. After the sixty days' period of newspaper publication has expired the claimant will furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

97. Section 2334 provides for the appointment of surveyors of mineral claims, authorizes the Commissioners of the General Land Office to establish the rates to be charged for surveys and for newspaper publications.

Under this authority of law the following rates have been established as the maximum charges for newspaper publications in mining cases:

(1) Where a daily newspaper is designated, the charge shall not exceed seven dollars for each ten lines of space occupied, and where a weekly newspaper is designated as the medium of publication five dollars for the same space will be allowed. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates established upon the understanding that they are to be in the usual body-type used for advertisements.

(2) For the publication of citations in contests or hearings involving the character of lands, the charges shall not exceed eight dollars for five publications in weekly newspapers, or ten dollars for publications in daily newspapers for thirty days.

103. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

III. DECISIONS.

1. The Register may exercise an official discretion in the designation of a paper for the publication of notice of a mineral application, and if the one published nearest the claim will not give publicity to the notice, another paper, in which the publication will effect the object of the law, may be designated. Tomay v. Stewart, 1 L. D. 570.

2. Notice of application for a mineral patent should be published in the paper which will give to it greatest publicity in the vicinity, even though such paper may not be the paper nearest the claim. Bretell v. Swift, 17 L. D. 558. (Modifying Bretell v. Swift, 16 L. D. 178.)

3. The selection of a newspaper for publication of a notice of application for a mining claim rests in the sound discretion of the Register. Other things being equal, the convenience of the applicant should be regarded. W. A. Arnold, 2 L. D. 758.

4. The Register may exercise an official discretion in the designation of the newspaper for the publication of notice of an application for a mineral patent. Erie Lode v. Cameron Lode, 10 L. D. 655.

5. In designating a newspaper as being the one of general circulation published nearest the land, the Register has a judicial discre-

tion, subject, however, to the supervisory authority of the General Land Office and Department of the Interior. Condon v. Mammoth M. Co., 15 L. D. 330.

6. The Register may exercise a legal discretion in designating the newspaper of general circulation published nearest a mining claim. (Lead City is nearer the land than Deadwood, but a mountain is between Lead City and the claim.) *Held*, the publication in the Deadwood paper was proper. Bretell v. Swift, 16 L. D. 178; 17 L. D. 558 (review).

7. In designating a newspaper for the publication of notice of a mineral application, the Register is not required to recognize the difference in distance from the claim between two papers published in the same city or town. Condon v. Mammoth M. Co., 15 L. D. 330.

8. The law is specific to the effect that notices of mining applications must be published in the newspaper nearest the mining claim. Omaha G. M. Co., 3 C. L. O. 36–163.

9. Publication in a paper of general circulation published *near* the land, though not the *nearest*, held good. Foley v. Omaha G. M. Co., 3 C. L. O. 36.

10. The application for patent must be rejected if notice thereof was not published in the newspaper nearest the land. Brown v. Lewis, 1 C. L. O. 50.

11. Only reputable newspapers nearest the claims should publish mining notices. Osmer C. Stewart, 8 C. L. O. 155.

12. A newspaper which changes figures to words so as to lengthen a notice of application for mineral patent, and so increase the cost of publication, is not a reputable paper; and a newspaper which does so will not be designated for the publication of such notices. Charles W. Steele, 3 L. D. 115.

13. Notice must be published by direction of the Register. If published by the Receiver without the knowledge or consent of the Register, it is invalid. Com'r to Central City Office, May 7, 1874, 1 C. L. O. 50.

14. Publication of notice of application for a mineral patent under the direction of the Receiver of the land office during a vacancy in the office of Register is the act of a *de facto* officer and is not invalid, and failure to adverse such application during such publication is a waiver of adverse rights. Jeffords v. Hine, 11 Pac. Rep. 351; 15 Mor. Min. Rep. 575.

15. Where the Register of the land office was suspended and the Receiver was directed to take charge of the office and received a mineral application and directed publication of notice thereof, his acts were those of an officer *de facto*, acting *colore officii*, and will be held valid. Dean Richmond Lode, 1 L. D. 545.

16. Notice of application for a mineral patent must give the course and length of the line connecting the claim with a corner of the public surveys or with a mineral monument. It is not sufficient to connect the claim with a corner of the survey of an unpatented mining claim. Emperor Wilhelm Lode, 5 L. D. 685.

17. Republication of notice of application for patent will be required where the published notice failed to fix the *locus* of the claim by a line connecting the same with a corner of the public survey or a United States mineral monument. Tennessee Lode, 7 L. D. 392.

18. A notice of application for a mineral patent that fails to connect the claim with the public surveys or a United States mineral monument is insufficient, and an entry allowed on such notice may not be referred to the Board of Equitable Adjudication in the presence of a protest of persons alleging adverse claims, but republication of notice will be required. Nil Desperandum Placer, 10 L. D. 198.

19. The published notice of application for a mineral patent is sufficiently definite as to showing the *locus* of the claim if it connects the same with the corner of a patented town site, which is also the corner of a patented placer, both of which are connected, in their respective surveys, to a United States mineral monument. (By instructions dated March 15, 1892, 14 L. D. 294, the Secretary holds that this decision will not be regarded as a precedent.) Eugene McCarthy, 14 L. D. 105.

20. The published notice of application for a mineral patent must follow the survey in giving a connection between the claim and a United States mineral monument or corner of the public surveys, and republication will be required if the *locus* of the claim is not so fixed in the published notice. Broad Ax Lode, 22 L. D. 244.

21. Where, by error in the survey of a mining claim, the line connecting the claim

was so erroneous as to place the claim about half a mile from its true position, it was held that the mineral entry should be referred to the Board of Equitable Adjudication without requiring republication of notice of application. Buena Vista Lode, 6 L. D. 646; Veta Grande Lode, 6 L. D. 718.

22. A mineral entry may be referred for confirmation to the Board of Equitable Adjudication where the *locus* of the claim was not shown in the published notice by a line connecting the claim with the public surveys. Silver King Quartz Mine, 11 L. D. 234.

23. Where the published notice of application for patent contains a slight error in the connection showing the *locus* of the claim, the entry may be referred to the Board of Equitable Adjudication. Alabama Quartz Mine, 14 L. D. 563.

24. Any defect in the published notice of application for a mineral patent is chargeable to the Register, whose duty it is to prepare and publish the same, and an entry may be referred to the Board of Equitable Adjudication, where such notice is defective in failing to connect the claim with a corner of the public surveys or a United States mineral monument. Mimbres M. Co., 8 L. D. 457.

25. Where the notices of application for patent were sufficiently definite in the matter of description of the claim to cause an adverse claim to be filed, republication of notice will not be required because of an error in the survey of ten degrees in the course and three chains in the length of the line connecting the survey of the claim with a corner of the public surveys, but the entry may be referred to the Board of Equitable Adjudication. Walter C. Childs, 10 L. D. 173.

26. Where by a typographical error the line connecting the claim with a public survey corner was published as 2,552.2 feet in length, instead of 2,252.2 feet, the mineral entry may be referred to the Board of Equitable Adjudication. Newport Lode, 6 L. D. 546.

27. Republication will be required if the *locus* of the claim applied for is not shown in the published notice by the connection given in the official survey (the published notice gave the bearing from corner No. 2 of the claim to United States mineral monument as N. 62° E., 582 feet, while the true course was N. 6° E.). Hoffman v, Venard, 14 L. D. 45.

28. A mineral entry may be passed to patent, notwithstanding the fact that the line connecting the claim with a corner of the public survey is incorrectly given in the published notice of application for patent as 822.42 feet, instead of 622.42 feet, where a line connecting the claim with a corner of the official survey of another claim was correctly stated in said notice. Departmental decision of May 20, 1896, Alsa R. Lode. See, also, French Lode, 22 L. D. 675.

29. Where notice of application for patent was not published for the required period and the General Land Office ordered republication on that account, without questioning the sufficiency of the notice, and the same notice is thereupon published for the proper period, republication should not again be required for a defect in said notice. Mimbres M. Co., 8 L. D. 457.

30. Republication of notice of application for patent must be accompanied by posting of notice in the local land office and of notice and plat upon the claim, as in the first instance, with the same rights to adverse claimants. American Flag Lode, 6 L. D. 320.

31. Where an entry is defective in that proper posting of notice of application and plat upon the claim is not shown, the claimant should be allowed to give new notice by publication and posting. Cornell Lode, 6 L. D. 717.

32. A published notice which gives the survey number of adjoining claims will not be held defective in that it did not give the names of such claims. Whitman v. Haltenhoff, 19 L. D. 245.

33. The statute does not require the names of adjoining claims to be given in the notices of application for patent, and a failure so to do will be waived, even in the face of a protest, if it appears that such failure was not fraudulent and that no injury is shown to have resulted therefrom. Louisville Lode, 1 L. D. 548.

34. *Contra:* A published notice of application for a mineral patent is insufficient if it fails to give the names of adjoining or neighboring claims. Gowdy v. Kismet G. M. Co., 22 L. D. 624.

35. An adverse claim filed in time according to then existing departmental rules, on the sixty-first day of publication, will be held

valid. Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391.

36. If the sixtieth day of publication of notice of application for a mineral patent falls on a legal holiday, an adverse claim may be filed on the next business day. Waterhouse v. Scott, 13 L. D. 718.

37. An adverse claim should not be received if not filed until after the expiration of the sixty days of publication. Nettie Lode v. Texas Lode, 14 L. D. 180.

38. In computing the sixty days of publication within which an adverse claim must be filed against a mineral application, the first day of publication is to be excluded. Miner v. Mariott, 2 L. D. 709; Bonesell v. McNider, 13 L. D. 286; Waterhouse v. Scott, 13 L. D. 718; Jefferson M. Co. v. Pennsylvania M. Co., 1 C. L. O. 66.

39. To be recognized by the Land Department under the provisions of section 2326, United States Revised Statutes, a suit must be based upon an adverse claim filed during the sixty days of publication of notice of application for patent, and must be commenced within thirty days after the filing of such adverse. Nettie Lode v. Texas Lode, 14 L. D. 180.

40. Though publication of notice of a mineral application in a weekly newspaper must cover sixty-three days, an adverse claim must be filed during the first sixty days thereof. Miner v. Mariott, 2 L. D. 709; Nettie Lode v. Texas Lode, 14 L. D. 180; Ledger Lode, 16 L. D. 101.

41. Though publication of notice of application for a mineral patent in a weekly paper must continue sixty-three days, it does not follow that notice by posting must cover that time. The requirement is that there must be sixty days of contemporaneous publication and posting. Tilden v. Intervenor M. Co., 1 L. D. 572; Great Western Lode, 5 L. D. 510.

42. If the sixtieth day of publication of notice of application for a mineral patent falls on Sunday, an adverse claim may be filed on the following Monday. Ground Hog Lode v. Parole & Morning Star Lodes, 8 L. D. 430.

43. An adverse complaint should show adverse claim to have been filed in the land office within sixty days of publication, and that suit was begun within thirty days from filing of adverse claim. Mattingly v. Lewis-ohn, 8 Mont. 259; 19 Pac. Rep. 310.

44. "If no adverse claim is filed during the required period of publication, it is assumed that the applicant is entitled to patent, and no agreement of parties can control this statutory provision. If either party claims a nonfulfillment of such agreement by the other, the remedy must be found in the courts, and not before your .office or this Department." Gustavus Hagland, 1 L. D. 591.

45. A stipulation between the applicant for patent and a party claiming adversely, that such opposing party may file an adverse claim within twenty days of the period of publication, is void. Morrison v. Lincoln M. Co., 6 C. L. O. 105.

46. An adverse mining claim, to be considered, must be filed within the period of publication. Tiernan v. Salt Lake M. Co., 1 C. L. O. 25.

47. If notice is posted in the local office on the first day of publication, an adverse claim should be filed within sixty days from that date; but, if such notice is not posted until three days thereafter, an adverse claim may be filed on the last day of publication. Great Western Lode, 5 L. D. 510.

48. The period of publication within which adverse claims must be filed ceases to run against adverse claimants if the posting of notice in the land office is not continuous. Tilden v. Intervenor M. Co., 1 L. D. 572.

49. Publication of notice of application for a mineral patent is process which brings all adverse claimants into court, and the grantee of an applicant for patent against whose application an adverse suit is pending takes *pendente lite*, even though no notice of *lis pendens* is filed. People *ex rel.* Darby v. District Court, 19 Colo., 343.

50. "The proceedings before the Land Department (under mineral law) are judicial in character, and the publication of notice as required brings all parties into court; and, if they stand by and allow the statutory time for filing adverse claims, or for bringing suit in support thereof, to elapse, their rights, so far as they might have been determined in such proceeding, in absence of fraud or mistake, . . . are lost." Kannaugh v. Quartette M. Co., 16 Colo. 341; 27 Pac. Rep. 245. See to same effect, Wight v. Dubois, 21 Fed. Rep. 693; Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77; 13 Colo. 174; 22 Pac. Rep. 436; Hunt v. Eureka Gulch M. Co., 14 Colo. 451; 24 Pac. Rep.

550; Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240.

51. Where publication of notice of application for a mineral patent was made for nine weeks only, under the Departmental practice then in force, and no rights are shown to have been injured thereby, it will not be declared insufficient on the motion of a mere protestant. Becker v. Sears, 1 L. D. 575.

52. Publication of notice of application for a mineral patent in a weekly paper requires ten insertions; but where only nine were made in accordance with the former practice of the Land Department, the entry may be referred to the Board of Equitable Adjudication for confirmation in the absence of any adverse rights. Oro Placer, 11 L. D. 457.

53. A publication in a weekly paper for nine successive weeks is not for the period of sixty days. McMurdy v. Streeter, 1 C. L. O. 34.

54. In the face of a protest, a mineral entry will be canceled where the certificate of the Surveyor General showing statutory expenditure to have been made upon the claim was not filed during the period of publication. Little Pet Lode, 4 L. D. 17, 284.

55. An applicant for patent for a mining claim must, within the sixty days of publication of notice of application, file a certificate of the United States Surveyor General showing an expenditure of $500 upon the claim, and additional time to make the required expenditure cannot be allowed under the law. White Cloud Copper M. Co., 22 L. D. 252.

56. An application for a mineral patent will be rejected and canceled upon the filing of a protest against the same, where the applicant failed to comply with the law by filing within the sixty days of publication the certificate of the United States Surveyor General as to the statutory expenditure upon the claim. Milton v. Lamb, 22 L. D. 339.

57. Posting on the claim must be in a conspicuous place. Failure to so post necessitates new notice by publication and posting. Ferguson v. Hanson, 21 L. D. 336.

58. Where the survey of a mining claim and the published notice based thereon are erroneous in describing the claim as being in a county other than the one in which it is actually situate, to the injury of adverse claimants, an amended survey and republication will be required. Henry v. Castner, 17 L. D. 565.

59. If the published notice was erroneous through the fault of the Register, he must make republication without expense to claimant. James M. Payne, 15 C. L. O. 97; Com'r to Spokane Office, Oct. 30, 1895, *In re* Northern Light Lode.

60. Republication may be for a portion of the claim not before published for. Com'r to Cheyenne Office, March 1, 1892, *In re* Greeley & Hayes Placer.

61. Republication must be accompanied by reposting on the claim and in the local office. Com'r to Durango Office, Sept. 14, 1895, *In re* Silver Monarch Lode.

62. The published notice of application for patent must appear in all copies of every issue of the paper, and if it does not, republication will be required. American Flag Lode, 6 L. D. 320.

63. In mining cases publication must be made in only one newspaper. Northern Light Lode, 1 C. L. O. 50.

64. Publication in two different papers, in each part of the time, is not legal publication. Com'r to E. H. Hazelton, Dec. 9, 1892.

65. Where the Register designates the daily issue of a newspaper for publication of notice of a mining application for patent, it should not be changed to the weekly edition. Charles W. Cannon, 3 C. L. O. 18.

66. A misstatement in the published notice as to the expiration thereof will not relieve adverse claimants of the duty of filing their adverse claims within the legal period. Bonesell v. McNider, 13 L. D. 286.

67. Patent was issued, based on an erroneous survey, but the notice of application for patent was so nearly correct as to be sufficient to put adverse claimants on their guard. In view of these facts, on the filing of a quitclaim deed of the patented land from the present owner to the United States, together with an abstract of title, a new and correct patent may be issued in the name of the original patentee without requiring republication. W. C. Childs, 13 C. L. O. 53.

68. Where a mineral patent issues based on an erroneous survey, a new patent in lieu thereof may not be issued without new notice by publication and posting, based on a correct survey, where the original survey is

so erroneous as not to cover any portion of the claim. If such patentee refuses to surrender the erroneous patent, and to reconvey the land covered thereby, suit to vacate the patent will be recommended by the Land Department. United States v. Rumsey, 22 L. D. 101.

69. The issuance of a mineral patent "is *prima facie* evidence that a discovery of mineral was made; that the land was properly located as mineral land; that the application for patent, the notices given by the defendants (applicants) and all other steps required by the law, had been regularly taken." Northern Pacific R. R. Co. v. Cannon, 7 U. S. App. 507.

70. An applicant for patent claiming under the Statute of Limitations must give notice of his application by publication and posting as in other cases. Com'r to Smith Bros., 7 C. L. O. 4.

71. Land covered by a mineral application for patent, of which notice has been given, may not be embraced in another application. Rebellion M. Co., 1 L. D. 542; A. J. Gibson, 21 L. D. 219.

72. The filing of a mineral application for patent, followed by publication of notice thereof, segregates the land applied for and bars the allowance of another application for the land. Rocky Lode, 15 L. D. 571.

73. Mere application for a patent to a mining claim, not followed by notice thereof, is not a segregation of the land, and confers no right upon which others are bound to wait indefinitely. Snow Flake Lode, 4 L. D. 30.

74. One who has filed an application for a mining patent but has given no notice thereof is bound to adverse the application of another who makes a subsequent application and gives notice thereof, and the failure so to do is a waiver of his rights. Snow Flake Lode, 4 L. D. 30.

75. In the published notice of a mineral application for patent, the claim of the applicant should be explicit. Such claim cannot exclude land in one part of the notice, and thereafter, in another part thereof, lay claim to the said tract. Samoa Lode, 17 C. L. O. 41.

76. It is too late, after a mining patent has issued, to make objection that publication was not in compliance with the act of July 26, 1866. Prince of Wales Lode, 2 C. L. O. 2.

77. No part of a mineral entry can stand if based on a false survey and publication. Gustavus Hagland, 1 L. D. 593.

78. Where, after publication of notice of application for patent and before entry, a mining claim is relocated by a stranger, for failure on part of the applicant to make the required annual expenditure, and such failure and relocation are shown at a hearing, the entry will be canceled and the parties left to litigate their conflicting claims in court. The Land Department will not pass upon the validity of the relocation in such a case. Little Pauline Lode v. Leadville Lode, 7 L. D. 506.

79. Failure to perform annual expenditure upon a claim up to date of entry will subject the claim to relocation even after application for patent and publication of notice thereof. Sweeney v. Wilson, 10 L. D. 157.

80. Where a claim has been abandoned after publication of notice of application therefor, and then relocated by a stranger, and subsequently entered by and patented to the applicant, the patentee will be declared trustee for the relocator. (Strong dissenting opinion.) South End M. Co. v. Tinney, 85 Pac. Rep. 89.

81. Entry should not be allowed where the claim applied for is involved in a pending suit to determine the right of possession thereto, instituted prior to publication of notice of application for patent. If on said suit it is adjudged that the applicant is not entitled to the possession of a part of the claim, he will not be allowed to enter such part. Northwestern Lode & Mill Site Co., 8 L. D. 437.

82. Where, in the published notice of application for patent, the applicant excludes "without waiver of rights" the ground in conflict with another claim, he cannot thereafter embrace said conflict in his entry without giving due notice of application for said conflict in the usual manner. Departmental decision of June 18, 1896, *In re* Canuck Lode; Com'r to Pueblo Office, Sept. 30, 1895, *In re* Lookout and other Lodes.

83. Where, on a contest between a mill site claimant and a lode claimant, the judgment of the General Land Office was that the land in conflict is non-mineral in character and that the lode claimant must give new notice of application for patent, the lode claimant may not allow said decision to become final, and then, by moving the reference of his entry to the Board of Equitable Adjudication, attempt indirectly to evade that portion of the decision adverse to him while

claiming its finality as against the contestant. Oscar Waller, 22 L. D. 318.

84. Claimant who has published notice of application for patent may not, by relinquishment, give to claimant of a conflicting claim the right to enter the conflict without publication. Com'r to Pueblo Office, Sept. 30, 1895, *In re* Lookout and other Lodes; Com'r to Pueblo Office, Jan. 17, 1896, *In re* Providence Lode.

85. The death of an applicant during publication does not affect its validity; the heirs may complete the proof. Com'r to Crump & Watkins, March 9, 1892.

86. Land returned as mineral in character is not subject to selection by a state as school indemnity land until the return has been overcome by testimony submitted after publication of notice, under paragraph 110 of Mining Circular, as amended July 2, 1894 (19 L. D. 21). State of California v. United States, 23 L. D. 402.

87. The fact that proof of publication of notice of application for patent is not on file in the local land office will not warrant the local land officers in rejecting an adverse claim. Waterhouse v. Scott, 18 L. D. 718.

88. A hearing should be ordered upon a protest of one alleging non-compliance by an entryman with the law relating to discovery, expenditure and notice of application for patent. Weinstein v. Granite Mountain M. Co., 14 L. D. 68.

89. A protest against a mineral application, filed after the period of publication, will not be considered by the Department on appeal, unless it is shown that the protestant has an interest in the ground involved, and that the law has not been complied with by the applicant. Parsons v. Ellis, 23 L. D. 69.

EXPENDITURE.

I. THE STATUTES.
II. REGULATIONS.
III. DECISIONS.

I. THE STATUTES.

(See secs. 2324 and 2325, U. S. Rev. Stats., pp. 70 and 137.)

Act of June 6, 1874.

AN ACT to amend the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the first day of January, eighteen hundred and seventy-five. (18 Stat. 61.)

Act of February 11, 1875.

AN ACT to amend section two thousand three hundred and twenty-four of the Revised Statutes, relating to the development of the mining resources of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act, and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act. (18 Stat. 315.)

Sec. 2 of the act of Jan. 22, 1880.

* * * * * * * *

Sec. 2. That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "*Provided*, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two. (21 Stat. 61.)

II. REGULATIONS.

5. In order to hold the possessory title to a mining claim located prior to May 10, 1872, and for which a patent has not been issued, the law requires that *ten dollars* shall be expended annually in labor or improvements on each claim of *one hundred feet* on the course of the vein or lode until a patent shall have been issued therefor; but where a number of such claims are held in common upon the same vein or lode, the aggregate expenditure that would be necessary to hold all the claims, at the rate of ten dollars per hundred feet, may be made upon any one claim; a failure to comply with this requirement in any one year subjecting the claim upon which such failure occurred to relocation by other parties,

the same as if no previous location thereof had ever been made, unless the claimants under the original location shall have resumed work thereon after such failure and before such relocation. The first annual expenditure upon claims of this class should have been performed subsequent to May 10, 1872, and prior to January 1, 1875. From and after January 1, 1875, the required amount must be expended *annually* until patent issues. By decision of the honorable Secretary of the Interior, dated March 4, 1879, such annual expenditures are not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

17. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed, or improvements made thereon annually until entry shall have been made. Under the provisions of the act of Congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. Expenditure made or labor performed prior to the first day of January succeeding the date of location will not be considered as a part of, or applied upon the first annual expenditure required by law. Failure to make the expenditure or perform the labor required will subject the claim to relocation by any other party having the necessary qualifications, unless the original locator, his heirs, assigns, or legal representatives have resumed work thereon after such failure and before such relocation.

18. The expenditures required upon mining-claims may be made from the surface or in running a tunnel for the development of such claims, the act of February 11, 1875, providing that where a person or company has, or may, run a tunnel for the purpose of developing a lode or lodes owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same.

19. The importance of attending to these details in the matter of location, labor, and expenditure will be the more readily perceived when it is understood that a failure to give the subject proper attention may invalidate the claim.

39. The claimant, either at the time of filing these papers with the register or at any time during the sixty days' publication, is required to file a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made upon the claim by the applicant or his grantors; that the plat filed by the claimant is correct; that the field-notes of the survey, as filed, furnish such an accurate description of the claim as will, if incorporated into a patent, serve to fully identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof.

40. It will be the more convenient way to have this certificate indorsed by the surveyor-general, both upon the plat and the field-notes of survey filed by the claimant as aforesaid.

74. As a condition for the making of application for patent according to section 2325, there must be a preliminary showing of work or expenditure upon each location, either by showing the full amount sufficient to the maintenance of possession under section 2324 for the pending year; or, if there has been failure, it should be shown that work has been resumed so as to prevent relocation by adverse parties after abandonment.

The "pending year" means the calendar year in which application is made, and has no reference to a showing of work at date of the final entry.

75. This preliminary showing may, where the matter is unquestioned, consist of the affidavit of two or more witnesses familiar with the facts.

III. Decisions.

1. A locator's only right to possession of a mining claim is conditional upon the performance, annually, of the required amount of labor; and if such labor is not performed, the ground is subject to relocation under section 2324, United States Revised Statutes, and the occupation of the ground by the original owner will not prevent relocation. Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341. (Refusing to follow Eilers v. Boatman, 3 Utah, 159; 2 Pac. Rep. 66; 1 West Coast Rep. 632; 15 Mor. Min. Rep. 462. See 111 U. S. 356; 15 Mor. Min. Rep. 471. Weise v. Barker, 7 Colo. 178; 2 Pac. Rep. 919; 2 West Coast Rep. 108; 15 Mor. Min. Rep. 462.)

2. The valid location of a mining claim is a grant from the government to the person making the location. The location is the inception of the grant and the patent is its consummation. The grant is kept alive by representation (work). A failure to represent forfeits the grant and makes void the title acquired by location, and the ground thereupon becomes again subject to location and purchase. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

3. When a valid location has been shown, performance of annual assessment work need not be proven unless non-performance thereof and relocation of the claim are alleged, and evidence thereof given by the other party.

Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345; Quigley v. Gillett, 101 Cal. 462; 35 Pac. Rep. 1040; Mattingly v. Lewisohn, 35 Pac. Rep. 111.

4. Discovery and appropriation are the source of title to mining claims, and development by work the condition of their continued possession. O'Reilly v. Campbell, 116 U. S. 418. (Citing Jennison v. Kirk, 98 U. S. 453; Jackson v. Roby, 109 U. S. 440.)

5. Discovery and appropriation are recognized as the source of title to mining claims, and development by working as the condition of continued ownership, until the issuance of patent therefor (entry of the claim and payment for the land). Erhardt v. Boaro, 118 U. S. 527; 2 McCrary, 141; 1 Mor. Min. Rep. 452.

6. Proof of a legal location of a mining claim and of possession thereof is proof of such a title as may be overthrown only by proof of forfeiture of the claim by failure to make the required annual expenditure thereon. Hammer v. Garfield M. & M. Co., 130 U. S. 291.

7. Miners' rules required possession of a mining claim to be predicated on a discovery and maintained by development work. Cons. Rep. Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490. (Following Jennison v. Kirk, 98 U. S. 453.)

8. Annual expenditure on a mining claim is necessary to support the possessory title thereto. American Hill Qtz. Mine, 5 C. L. O. 114.

9. The first discoverer of a mine can derive no benefit from his discovery unless he follows it up by work for the development of his claim. Jackson v. Roby, 109 U. S. 440.

10. Under the miners' common law, previous to United States legislation, work was required to hold a location. Cons. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

11. "A location since the 10th day of May, 1872, based on a discovery made within the limits of a claim properly located, and not abandoned or lost by failure to perform the labor thereon required by law, is an invalid location; for by the provisions of section 2322, the locator of such claim has the exclusive right of possession and enjoyment of all the surface included within the lines of the location, and of all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines." Branagan v. Dulaney, 2 L. D. 744.

12. On failure of claimants to do the required annual labor on a mining claim within the time allowed therefor, the claim is subject to relocation. De Puy v. Williams, 26 Cal. 310; 5 Mor. Min. Rep. 251.

13. A location on which annual expenditure in labor or improvements is not made as required by law may be relocated if work has not been resumed. Russell v. Brosseau, 65 Cal. 605; 4 Pac. Rep. 643; Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341.

14. The failure of a locator of a placer mining claim to perform the annual amount of work required by section 2324, United States Revised Statutes, renders the claim subject to relocation. Morgan v. Tillottson, 73 Cal. 520; 15 Pac. Rep. 88.

15. A locator of a mining claim who has allowed his location to lapse for failure to do the annual assessment work, and to become subject to relocation under section 2324, United States Revised Statutes, providing for the relocation of claims on which the required annual amount of work has not been done, has the right to make a new location covering the same ground. Warnock v. DeWitt, 11 Utah, 324; 40 Pac. Rep. 205.

16. Failure to perform assessment work as required by State law subjects the claim to relocation. Kramer v. Settle, 1 Idaho, 485; 9 Mor. Min. Rep. 561.

17. The laws and customs which point out the manner of locating mining claims are conditions precedent to the right to possess and mine a claim, and no such right can be acquired until such conditions precedent are complied with. The requirements as to performance of annual labor, however, are conditions subsequent, the mere breach of which is not, *per se*, sufficient to cause a forfeiture, which must result from entry by the grantor (the United States) or one claiming under it, *i. e.*, a relocation of the claim under the mineral laws. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

18. After legal abandonment of a claim by failure to perform annual labor, it is the entry by a relocator, not mere lapse of time, that destroys the right of the original owner. Little Gunnell M. Co. v. Kimber, 1 Mor. Min. Rep. 536 (Colo.).

19. The failure to perform the work on a mining claim required by law amounts to an abandonment of the claim, and thereupon it may be occupied by another. Kramer v. Settle, 1 Idaho, 485; 9 Mor. Min. Rep. 561.

20. The law presumes that locators forfeit their rights by failing to comply with local rules and customs relative to annual work, although no penalty is specified by such rules or customs for non-compliance. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

21. A mining locator forfeits his claim if he does not each year perform work or make improvements of the value of $10 for each hundred feet of the vein (under act of 1866). Original M. Co. v. Winthrop M. Co., 60 Cal. 631.

22. A failure to perform the amount of work required by local rules of miners is an abandonment of the claim. St. John v. Kidd, 26 Cal. 263; 4 Mor. Min. Rep. 454.

23. The failure of an applicant to perform annual labor on his claim between the dates of application for patent and of entry will subject the claim to relocation. McNeil v. Pace, 3 L. D. 267.

24. After failure to do work for any full year, he who first locates the ground after the expiration of the year has the better title thereto. Belk v. Meagher, 3 Mont. 65; 104 U. S. 279; 1 Mor. Min. Rep. 510.

25. The title of a successful plaintiff in an adverse suit is a possessory one, and may be lost by failure to make the required expenditure, followed by relocation of the claim by a third person. Com'r to Leadville Office, Feb. 24, 1896, *In re* Kennedy v. Johnston.

26. Failure to perform annual assessment work according to law may be waived by the Land Department, even in the face of an adverse relocator, if such failure occurred through mistake of a *bona fide* claimant. Stewart v. Reeves, 21 L. D. 446, Jaw Bone Lode.

27. Failure to perform annual labor on the senior of two conflicting locations during the calendar year does not operate to vest title to the land in conflict in the owner of the junior location, who can secure the same only by a relocation made before the resumption of work by the senior locator. Oscamp v. Crystal River M. Co., 19 U. S. App. 18; 58 Fed. Rep. 293.

28. By an amended location, a junior locator acquires a right to the conflict with a prior location, then abandoned. Subsequent resumption of work by the first locator will not defeat this right. Johnson v. Young, 18 Colo. 625; 34 Pac. Rep. 173.

29. If work is resumed on a claim after it has once been opened to relocation, but before a relocation has actually been made, the rights of the original owners stand as they would if there had been no failure to comply with the law. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65.

30. Resumption of work upon a claim subject to relocation must be in good faith. Hirschler v. McKendricks, 16 Mont. 211; 40 Pac. Rep. 290; Bishop v. Baisley, 41 Pac. Rep. 936.

31. Mere occupancy of a mining claim on which required annual expenditure has not been made will not prevent relocation thereof. Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341.

32. Where a mining claim has become subject to relocation, the resumption of work thereon by the original locator after a notice of relocation has been posted thereon, but before the relocator has marked the boundaries of his relocation, is sufficient, under section 2324, United States Revised Statutes, to prevent the original location from becoming forfeited. Pharis v. Muldoon, 75 Cal. 284; 17 Pac. Rep. 70.

33. Resumption of work on a claim open to relocation, prior to relocation, will prevent forfeiture thereof. Anderson v. Byam, 8 L. D. 388.

34. The resumption of work on an abandoned claim by the original owner, before a relocation thereof, will prevent forfeiture of his rights. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Belcher Cons. G. M. Co. v. Defferrari, 62 Cal. 160; Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341; Pharis v. Muldoon, 75 Cal. 284; 17 Pac. Rep. 70; Lacey v. Woodward, 25 Pac. Rep. 785; McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329; Gonu v. Russell, 3 Mont. 358; 12 Mor. Min. Rep. 630; Belk v. Meagher, 3 Mont. 65; 104 U. S. 279; 1 Mor. Min. Rep. 510.

35. "When, therefore, he avails himself of the statutory privilege of resuming work to

preserve his estate from forfeiture, we hold that he should have prosecuted the same with reasonable diligence until the requirement for the annual labor and improvements had been obeyed." Honaker v. Martin, 11 Mont. 91; 27 Pac. Rep. 397. (Followed in Hirschler v. McKendricks, 16 Mont. 211; 40 Pac. Rep. 290.)

36. When work is resumed on an abandoned claim to avoid relocation by third parties, the work for the previous year, viz., $100 worth, should be done within a reasonable time or the claim may be relocated. Honaker v. Martin, 11 Mont. 91; 27 Pac. Rep. 397. (Refusing to follow Belcher Cons. G. M. Co. v. Defferrari, 62 Cal. 160, and citing Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; Little Gunnell M. Co. v. Kimber (Colo.), 1 Mor. Min. Rep. 536.)

37. The resumption of work upon a mining claim before the relocation, for the purpose of preventing a forfeiture as prescribed by section 2324, United States Revised Statutes, cannot be held to have been prosecuted with due diligence where it appeared that fifteen days prior to relocation all work thereon had ceased. Hirschler v. McKendricks, 16 Mont. 211; 40 Pac. Rep. 290.

38. Resumption of work to avoid forfeiture must be *bona fide*, not merely formal. Belcher Cons. G. M. Co. v. Defferrari, 62 Cal. 160; McCormick v. Baldwin, 104 Cal. 227; 37 Pac. Rep. 903.

39. Annual expenditure is not required to be made during any particular portion of the year. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510.

40. There can be no forfeiture of a mining claim for non-performance of annual assessment work until the expiration of the year in which such assessment work should have been done. Belk v. Meagher, 3 Mont. 65; 104 U. S. 279; 1 Mor. Min. Rep. 510.

41. A mining claim is not subject to relocation for abandonment until after the expiration of the calendar year. Mills v. Fletcher, 100 Cal. 143; 34 Pac. Rep. 637.

42. An attempted relocation of a claim before the expiration of the time for performing annual labor is a nullity, and cannot be validated by the fact that, within such time, no work was done by the original owners. Slavonian M. Co. v. Vacavich, 7 Sawy. 217; 7 Fed. Rep. 331.

43. If the plaintiffs perform the acts required by law to locate a quartz claim, except the labor, the year not having expired, and the defendants undertook to take possession of the ground, they were trespassers. Atkins v. Hendree, 1 Idaho, 95; 2 Mor. Min. Rep. 328; Hall v. Hale, 8 Colo. 351; 8 Pac. Rep. 580.

44. Under the act of May 10, 1872, representation by annual performance of labor is constituted one of the muniments of title. No forfeiture can take place until after the expiration of the year during which, by law, the work may be done. Belk v. Meagher, 3 Mont. 65; 104 U. S. 279; 1 Mor. Min. Rep. 510.

45. Annual labor may be performed at any time during the year, and a relocator before the expiration of the year is a mere trespasser. Atkins v. Hendree, 1 Idaho, 95; 2 Mor. Min. Rep. 328; Hall v. Hale, 8 Colo. 351; 8 Pac. Rep. 580.

46. The first annual expenditure on mines located prior to May 10, 1872, should have been made prior to January 1, 1875, when notice should have been first given to delinquent co-owners. Minnie Tunnel and Mining Co., 3 C. L. O. 66.

47. The time for making the required expenditures on mining claims located prior to May 10, 1872, was extended to January 1, 1875. Act June 6, 1874 (18 Stat. 61).

48. The year within which the required annual expenditures must be made commences with January 1 of the year next succeeding that in which the location is made. Act of Jan. 22, 1880 (21 Stat. 61).

49. Above act construed. Com'r to H. N. Copp, May 1, 1880, 7 C. L. O. 20; Circular of Jan. 17, 1881, 8 C. L. O. 71.

50. The effect of the act of January 22, 1880 (21 Stat. 61), was to extend the year for performing annual assessment work from July 29, 1879, to December 31, 1880. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329; Hall v. Hale, 8 Colo. 351; 8 Pac. Rep. 580.

51. The required annual expenditures must be made on a mining claim during every calendar year succeeding the year in which the location is made, and an expenditure of $100 during the year of location will not obviate the necessity of making expenditures the next year. Com'r to G. A. Haynes, Nov. 10, 1880, 7 C. L. O. 130.

52. Expenditures were not required on mining claims during the year 1893 (except in the state of South Dakota), but, to secure the benefit of the act, claimant was required to file during that year, in the office of the recorder of mining location notices, a declaration of intention to hold and work the claim in good faith. Act of Nov. 3, 1893 (28 Stat. 6). The same provision was made for the year 1894. Act of July 18, 1894 (28 Stat. 114).

53. A notice of intention to hold a claim, provided for by the act of November 3, 1893, may cover more than one if sufficiently specific. Com'r to F. H. Winston, Dec. 21, 1893.

54. An affidavit of performance of annual labor, when recorded, is *prima facie* proof of compliance with law in this respect under the Montana statutes. Coleman v. Curtis, 12 Mont. 301; 30 Pac. Rep. 266; Davidson v. Bordeaux, 15 Mont. 245; 38 Pac. Rep. 1075.

55. An affidavit of annual labor, where authorized by law to be filed as *prima facie* evidence of performance of the labor, may be filed as soon as the labor is done, even if before the expiration of the time limited therefor. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

56. Where the filing of affidavits of performance of annual labor is authorized by law, one affidavit may cover the work done on several claims where not prohibited by law. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

57. The law requiring affidavits of performance of annual labor to be filed with the recorder does not estop a claimant from proving performance of such labor by any other competent testimony. Book v. Justice M. Co., 58 Fed. Rep. 106.

58. "Work done outside of the claim, or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be formed well-adapted and intended to work several contiguous claim or lodes, and, when such is the case, work in furtherance of the system is work on the claims intended to be developed by it." Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616. (Quoted and followed in Kirk v. Clark, 17 L. D. 190.)

59. "Work done outside of a mining claim, and with direct relation to the claim, may be considered as work done on the claim. The evidence of such work having been done should be received with great caution, and it should appear clearly that such work was intended for the improvement of such claim and no other." Kramer v. Settle, 1 Idaho, 485; 9 Mor. Min. Rep. 561.

60. Annual work must be done either within the claim, or, if off from it, as a necessary means of extracting the ore therefrom. The erection of a dwelling-house without the boundaries of the claim for the convenience and shelter of miners cannot be considered as a part of such work. Remington v. Baudit, 6 Mont. 138; 9 Pac. Rep. 819.

61. Work need not necessarily be done within the lines of the claim to be for its benefit. Book v. Justice M. Co., 58 Fed. Rep. 106.

62. Work done outside of a claim may be counted if for its benefit. Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362; Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616; English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202.

63. Where that portion of the claim entered on which are situate the discovery and improvements is excluded from the entry, it is incumbent on the claimant to show a discovery and the required expenditure on claimed ground. Antediluvian Lode and Mill Site, 8 L. D. 602; Independence Lode, 9 L. D. 571; Lone Dane Lode, 10 L. D. 53.

64. Work done outside of a mining claim, if for the purpose of developing the claim, is as available as if done within the boundaries of the claim. A group of contiguous claims may be worked by one general system, and work in furtherance of the system is work done on the claim. Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362.

65. Improvements made outside the surface boundaries may be considered in determining whether the law requiring the expenditure of $500 on the claim has been complied with, where it appears that such improvements were made to facilitate the extraction of ore from said claim, and are not included in the improvements upon any other claim. American Antimony Co., 6 L. D. 220.

66. Labor and improvements, within the meaning of the statute, are deemed to have

been made on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, though such labor and improvements may be at a distance from the claim itself. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Jackson v. Roby, 109 U. S. 440.

67. Assessment work done on an excluded portion of a claim for the benefit of the claimed portion may be counted even if the excluded part is covered by agricultural patent. Richards v. Wolfing, 98 Cal. 195; 32 Pac. Rep. 971.

68. Work done outside of the claim upon another patented claim, if for the benefit of the unpatented claim, may be considered as having been done upon it. Hall v. Kearney, 18 Colo. 505; 33 Pac. Rep. 373.

69. The discovery and development work must be on claimed ground. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

70. Where improvements not situate upon the claim applied for are alleged to have been made for the development of said claim, the way in which they tend to such development should be shown. Louise Mining Co., 22 L. D. 663.

71. Patent will not issue for a mining claim where the land on which is situate the discovery and improvements is excluded from the entry, unless a discovery and the required expenditure are shown to have been made on entered ground. Antediluvian Lode and Mill Site, 8 L. D. 602; Thomas J. Laney, 9 L. D. 83; Trophy M. Co., 10 L. D. 53.

72. The annual expenditure required upon mining claims may be made in running a tunnel. Circular as to Tunnel Rights, 5 C. L. O. 34.

73. The annual expenditure may be made from the surface or in running a tunnel for developing a lode. Com'r to E. D. Coleman, May 27, 1874, 1 C. L. O. 34.

74. Under the lien laws a blacksmith may do work on a claim in caring for the tools used thereon. Malone v. Big Flat Gravel Co., 18 Pac. Rep. 772.

75. An applicant for a mineral patent must show the land claimed to contain valuable mineral, and that the improvements upon the claim tend to its development. John Downs, 7 L. D. 71.

76. A finding that seventeen days' work (of more than the usual number of hours), and $8 worth of materials furnished, constitute $100 assessment work, will not be disturbed, wages being $3 per day. McGrath v. Bassick, 19 Pac. Rep. 462.

77. In an action to quiet title to a mining claim, where plaintiff sought to prove the performance of annual labor before defendant's relocation, a finding of the jury under defendant's testimony that the value of such work was worth less than $100 will not be disturbed on appeal, where plaintiff barely proved the performance of the required work, if at all, under the best view of his testimony. Hirschler v. McKendricks, 16 Mont. 211; 40 Pac. Rep. 290.

78. Services in planning and superintending development work upon a mine, or of the erection of a mill and machinery, are work and labor on the mine. (Lien law.) Rara Avis G. & S. M. Co. v. Bouscher, 9 Colo. 305; 12 Pac. Rep. 433.

79. One who personally superintends work in a mine performs labor within the lien laws. Rara Avis G. & S. M. Co. v. Bouscher, 9 Colo. 305; 12 Pac. Rep. 433; Kenard v. Old Hickory M. Co., 6 Pac. Rep. 415; Palmer v. Uncas M. Co., 11 Pac. Rep. 666.

80. The cost of a preliminary survey of the line of a ditch intended to carry water onto a mining claim cannot be considered as expenditure in the development of the mine unless the ditch shall have been actually constructed. An entry allowed on the theory that such expenditure is a compliance with legal requirements should not be canceled, however, in the absence of an adverse claim, but merely suspended, so as to allow the party to comply with the law. Stork & Heron Placers, 7 L. D. 359.

81. A miner's cabin, not on the claim, is not a mining improvement. "If such kind of work or improvements off the claim were sufficient for the purpose of representation and patent, then the building of a house in a town or city, no matter how far away from the mine, if the miner had his meals and lodged there, might entitle him to hold his claim," etc. Remington v. Baudit, 6 Mont. 138; 9 Pac. Rep. 819.

82. A building (ore house), to be an improvement upon a claim, must be placed there for the benefit and development of the claim. Bryan v. McCaig, 10 Colo. 309; 15 Pac. Rep. 418.

83. Assessment work may be done in digging, erection of works for mining, in placing machinery, or in buildings on the claim, necessary for its working. Lockhart v. Rollins, 2 Idaho, 503; 21 Pac. Rep. 413.

84. Labor to the required amount, performed by the owner of a mine in constructing a wagon road thereto and partly thereon, for the development and working thereof, may be treated as a compliance with the law relating to annual labor. Doherty v. Morris, 11 Colo. 12; 16 Pac. Rep. 911; 17 Colo. 105; 28 Pac. Rep. 85.

85. A trail and a wagon road a mile long running from a lode claim to a smelter, made for the transportation of ore from the lode claim to the smelter, may be considered as improvements upon the lode claim. Emily Lode, 6 L. D. 220.

86. A road, no part of which is upon the claim applied for, and not made for the sole benefit thereof, cannot be considered as an improvement on the claim. Alice Edith Lode, 6 L. D. 711.

87. Work done on a road made for the development of a group of mining claims may not be apportioned as done for the benefit of claims on which no portion of the road is located. White Cloud Copper M. Co., 22 L. D. 252.

88. Roads and necessary work may be included in the $500 expenditure. Com'r to Albert Johnson, Dec. 14, 1880, 7 C. L. O. 179.

89. Wages for a watchman who cares for idle mining works is spent for the benefit of the claims within the intent of the law requiring assessment work. Lockhart v. Rollins, 2 Idaho, 503; 21 Pac. Rep. 413.

90. Where an expense of sharpening picks as a part of the authorized work on a mining claim is sought to be proved, the exclusion of the evidence is proper where the counsel refused to inform the court, although requested to do so, as to whether he wished to show that the picks had been sharpened on the premises or before they were taken there. Hirschler v. McKendricks, 16 Mont. 211; 40 Pac. Rep. 290.

90a. Working on adjoining land in constructing a drain to enable the owners to work the claim is to be considered as work done on the claim. Packer v. Heaton, 9 Cal. 568 (1858); 4 Mor. Min. Rep. 447.

91. Work done on a ditch outside of a placer claim, and prior to the location of the claim, cannot be considered as having been done for the benefit of the claim in the absence of a clear showing of such fact. Trickey Placer, 7 L. D. 52.

92. The extension of a flume over premises sought to be held as a mining claim, and their use as a place of deposit for the waste material from an adjoining claim owned by the same person, is not such an expenditure upon them as will sustain the claim under the law. Jackson v. Roby, 109 U. S. 440.

93. The turning of a stream, the introduction of water, the construction of a flume to carry off debris or waste material, is labor and improvements within the meaning of the statute. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

94. Leasing a mill not upon the claim and not used in connection with the claim, and expenditure of money for personal expenses in the attempt to secure water with which to operate the mill, cannot be considered as work done or expenditure made upon the claim. Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341.

95. Assaying and sampling ores does not constitute expenditure for the development of a claim. Bishop v. Baisley, 41 Pac. Rep. 936.

96. Efforts to secure machinery necessary to work a mine are, by relation and intendment, work done upon the claim. Packer v. Heaton, 9 Cal. 568 (1858); 4 Mor. Min. Rep. 447.

97. Expenses in traveling to and in locating and recording a claim cannot be considered annual expenditure. J. M. Crawford, 9 C. L. O. 130.

98. Expenditure, to be considered as for the benefit of a claim, must have some direct relation to its development. The traveling expenses of the owner do not have such relation. Du Prat v. James, 65 Cal. 555; 4 Pac. Rep. 562; 3 West Coast Rep. 108; 15 Mor. Min. Rep. 341.

99. Expenditure must be of such character as to enable the United States Surveyor General to certify to it as having been made for

the development of the claim. Bishop v. Baisley, 41 Pac. Rep. 936.

100. The act of February 11, 1875, credits to a lode claim the annual expenditure made in running a tunnel for the purpose of developing the lode owned by the proprietors of the tunnel. George S. Dodge, 6 C. L. O. 122.

101. Annual labor must be performed with direct reference to the claim to which it is accredited. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

102. Improvements must tend "to facilitate the extraction of the metals it may contain." Gird v. California Oil Co., 60 Fed. Rep. 531; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

103. Work done off the claim must have some direct relation to the claim or be in reasonable proximity to it. McGarrity v. Byington, 12 Cal. 426; 2 Mor. Min. Rep. 311.

104. Annual labor must be done with a view to prospect or develop the claim with reasonable directness. Gird v. California Oil Co., 60 Fed. Rep. 531.

105. Work may be done or improvements made upon one or more locations of a group of claims, contiguous and held in common, for the development of the entire group, and when so done or made to the required amount may be considered as a compliance with the law requiring annual expenditure or expenditure of $500. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Jackson v. Roby, 109 U. S. 440; Chambers v. Harrington, 111 U. S. 350; Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; De Noon v. Morrison, 83 Cal. 163; 23 Pac. Rep. 374; Eberle v. Carmichael, 42 Pac. Rep. 95; McNeil v. Pace, 3 L. D. 267; Good Return M. Co., 4 L. D. 221; Circular, March 24, 1887, 8 L. D. 505; Nichols v. Becker, 11 L. D. 8; Sweeney v. N. P. R. R. Co., 20 L. D. 394; Ferguson v. Hanson, 21 L. D. 336.

106. "The last position of the court below, that the owner of contiguous locations who seeks a patent must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been performed, is as untenable as the rulings already considered." St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

107. "Where one person or company owns several contiguous adjoining claims capable of being advantageously worked together, one general system may be adopted to work such claims. Such system may consist of a shaft with drifts, cross-cuts and tunnels therefrom, and such works need not be upon any of the claims in question. When such system is adopted, work in the furtherance of the system is work on the claims intended to be developed by it. Work done *outside of the claims*, or outside of any claim, if done for the purpose, and as a means of prospecting or working the claim, is as available for holding the claim as if done within the boundaries of the claim itself." Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

108. When several adjoining mining claims are held in common, work for the benefit of all, done upon any one or more of them, in a given year, to the total amount required to be done upon all if worked separately, will preserve the group of claims from relocation under section 2324, United States Revised Statutes. Chambers v. Harrington, 111 U. S. 350. (Citing Jackson v. Roby, 109 U. S. 440.)

109. While it is not required that, upon several separate locations embraced in one entry, the $500 expenditure must be expended upon each location, it is obvious that if made upon one it should be so placed as to tend to the development of the entire claim or each separate location embraced therein. Emugene Folsom, 16 C. L. O. 279.

110. A tunnel on one of several claims cannot be counted as work for the benefit of the group if, in fact, it does not so tend. McCormick v. Baldwin, 104 Cal. 227; 37 Pac. Rep. 903.

111. Work done upon the claim, even though upon a lode the apex of which is outside the claim, will prevent forfeiture. Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

112. Where several mining claims are held in common either by a legal or an equitable title, the aggregate amount of annual assessment work necessary to hold all of them may be done on one of them if for the development of all. Eberle v. Carmichael, 42 Pac. Rep. 95.

113. If expenditures and improvements are made for the benefit of several claims,

the Surveyor General's certificate should show what part of such expenditures is exclusively credited to the claim for which patent is asked. Nil Desperandum Placer, 10 L. D. 198.

114. Where several mining claims are held in common, the required annual expenditure may be made upon any one of them, but must be for the purpose of developing all the claims. Jackson v. Roby, 109 U. S. 440.

115. A claimant making annual expenditure on one of two claims held in common for the benefit of the claim involved is not bound to prove record title to the location on which the work was done, having shown possession. De Noon v. Morrison, 83 Cal. 163; 23 Pac. Rep. 374.

116. Where several locations are embraced in one application for patent, and an expenditure of $500 is not shown on each claim, it must be made to appear that $500 has been spent for the joint benefit of the various locations. Andromeda Lode, 18 L. D. 146.

117. If expenditure and improvements are made as a part of a general system of development of several neighboring claims not embraced in one application for patent, it must be shown what part of such expenditures or improvements is exclusively credited to the claim applied for. Nil Desperandum Placer, 10 L. D. 198.

118. Where a number of persons not a company locate fifteen hundred feet of mineral land in a body, but divide the same into various claims which they hold in severalty, the sinking of a shaft on one of these claims is not sufficient to perfect title to the whole. Zeckendorf v. Hutchison, 1 New Mex. 476; 9 Mor. Min. Rep. 483.

119. Expenditures of $500 must be shown on every location of a group of claims embraced in one application for patent unless that sum is shown to have been expended for the joint development of the several claims of the group. Sweeney v. N. P. R. R. Co., 20 L. D. 394; Ferguson v. Hanson, 21 L. D. 386.

120. Claims must be contiguous in order to have labor done on one inure to the benefit of another. Gird v. California Oil Co., 60 Fed. Rep. 531.

121. Money expended in mining tunnels to develop one or more lodes is considered as work done on those lodes. William S. Merrell, 5 C. L. O. 5.

122. Work may be done as a part of a general system upon one of several contiguous locations held in common and applied to all the claims of the group. Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

123. An application for a mineral patent will be rejected and canceled upon the filing of a protest against the same, where the applicant failed to comply with the law by filing within the sixty days of publication the certificate of the United States Surveyor General as to statutory expenditure upon the claim. Milton v. Lamb, 22 L. D. 389.

124. Under section 2325, United States Revised Statutes, the certificate of the United States Surveyor General is evidence of the sufficiency of the work performed and improvements made upon a mining claim in his State, and in an action to annul a patent it is error to strike out of the answer the allegation that the Surveyor General for Montana took the evidence required by law, and decided that the work and improvements equaled $500. United States v. King, 9 Mont. 75; 22 Pac. Rep. 498.

125. The certificate of the United States Surveyor General that $500 worth of labor has been expended, or improvements made upon the claim by the claimant or his grantors, must be filed before the expiration of the sixty days of publication. But in an explanatory letter of December 16, 1885 (unpublished), the Secretary says: "But in the absence of any protest or evidence showing bad faith on the part of the applicant, I see no reason why generally he should not be permitted to file the certificate, said certificate . . . may be considered as filed *nunc pro tunc*." Little Pet Lode, 4 L. D. 17.

126. An applicant for patent to a mining claim must within the sixty days of publication of notice of application file a certificate of the United States Surveyor General showing an expenditure of $500 upon the claim, and additional time to make the required expenditure cannot be allowed under the law. White Cloud Copper M. Co., 22 L. D. 252.

127. The certificate of the United States Surveyor General is not binding upon the land office, but where patent has issued thereon it may not be attacked collaterally in an action at law. United States v. Iron S. M. Co., 128 U. S. 673. (Affirming 24 Fed. Rep. 568.)

128. In a suit to vacate patent on the ground of fraud, the certificate of the United States Surveyor General may not be attacked, and proof of fraud must be clear. United States v. King, 9 Mont. 75; 22 Pac. Rep. 498.

129. The United States Surveyor General may call for additional evidence of $500 expenditure. J. H. Russell Lode, 5 C. L. O. 18.

130. The United States Surveyor General is not required to make a separate certificate as to the $500 improvements on a mining claim. Juniper Mine, 4 C. L. O. 114.

131. The return of the United States Deputy Mineral Surveyor as to improvements upon a mining claim should state that they were made by the claimant or his grantors. Circular, Nov. 20, 1878, 1 C. L. O. 13.

132. The purchaser of a lode claim from a prior locator is entitled to all the mineral veins and lodes in such claim, and to the benefit of all expenditures made by his grantor in the development thereof; and the right to such benefit is not defeated by a subsequent amended location wherein the purchaser makes use of a discovery of his own within the limits of said purchase and on a junior location embraced for the greater part within the boundaries of said purchase. Tam v. Story, 21 L. D. 440.

133. Five hundred dollars expenditure must be made by the applicants for patent or their grantors in case of a relocated mine. Com'r to William A. Arnold, Jan. 30, 1875, 1 C. L. O. 179.

134. Work done for the benefit of a claim, whether by one holding the legal or equitable title thereto, will operate to preserve the claim from forfeiture. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

135. Work done for the development of a mining claim by one holding an equitable interest therein inures to the benefit of the claim. Book v. Justice M. Co., 58 Fed. Rep. 106.

136. Expenditures made by prior claimants, who abandoned the claim, cannot be considered. They must be made by applicant or his grantors. Andrew M. Embry, 7 C. L. O. 5; Copp's Min. Lands, 241 (2d ed.).

137. Mere possession of abandoned mining improvements is not a mining claim. Richards v. Dower, 81 Cal. 44; 22 Pac. Rep. 304. See 151 U. S. 658.

138. Improvements made by trespassers upon a mining claim may not be purchased by a claimant after suit brought to determine the right of possession, and considered as having been made originally by claimant. Little Gunnell M. Co. v. Kimber, 1 Mor. Min. Rep. 536.

139. A relocation of a mining claim is an implied admission of the validity of the original location, and an assertion that the relocator claims a forfeiture by reason of a failure on the part of the original locator to make his annual expenditures. Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795.

140. An unincorporated association of citizens owning separate and distinct interests in a placer mine may unite their means and expend the $500 required by the mining laws at one point and thereafter secure patent. Dudley Chase, 2 C. L. O. 114.

141. When A. and B. claim by location, and A. relocates to avoid relocation by strangers, and afterwards acquires B.'s title, the work done on the relocation may be taken as a resumption of work on the original location if A. elects to claim thereunder. Johnson v. Young, 18 Colo. 625; 34 Pac. Rep. 178.

142. An application to make mineral entry by a successful adverse claimant must be accompanied by an official plat and field notes describing the tract awarded him, and by a certificate of the United States Surveyor General of an expenditure of $500 upon the tract sought to be entered. Albert F. Harsh, 2 L. D. 706.

143. If parties have not been properly notified or have not paid their share of the annual expenditure on a mine, they must file their adverse claims. Grampian Lode, 1 L. D. 544.

144. Where part of the land embraced in a mineral entry is entered by virtue of a transfer thereof to the applicant by an adverse claimant who had secured a judgment therefor, the entryman, as to that tract, stands in the place of his grantor, and must show $500 expenditure thereon. Jackson M. Co., 8 L. D. 149.

145. After a mining claim has been paid for and a mineral entry made therefor, annual expenditures (or "assessment work") thereon are not required. Benson M. & Sm. Co. v. Alta M. & Sm. Co., 145 U. S. 428. (Affirming Alta M. & Sm. Co. v. Benson M. & Sm.

Co., 16 Pac. Rep. 565; and citing and approving American Hill Quartz Mine, Sickel's Min. Dec. 377–385; Copp's Min. Lands, 254; Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581; Deno v. Griffin, 20 Nev. 249; 20 Pac. Rep. 808. To same effect see, also, F. P. Harrison, 2 L. D. 767; Alice Placer, 4 L. D. 314; Sweeney v. Wilson, 10 L. D. 157; Ferguson v. Belvoir M. & M. Co., 14 L. D. 48.)

146. Annual expenditure is necessary up to date of entry, and is not excused by court proceedings on an adverse claim. Clark v. American Flag G. M. Co., 7 C. L. O. 5.

147. The failure to perform annual expenditure upon a claim up to date of entry will subject the claim to relocation even after application for patent and publication of notice thereof. Sweeney v. Wilson, 10 L. D. 157.

148. Annual expenditure must be made on a mining claim up to the date of entry to prevent the relocation thereof for forfeiture, and the fact that large expenditures have been made will not prevent such relocation, even though the applicant *thought* he had made entry. Ferguson v. Belvoir M. & M. Co., 14 L. D. 48.

149. The filing of application for a patent to a mining claim does not relieve the claimant from the necessity of performing the usual annual assessment work to prevent his claim from becoming subject to relocation. Com'r to Fletcher Maddox, Jan. 13, 1892.

150. Annual expenditure is not required on placer claims. Com'r to R. B. Patton, April 25, 1874, 1 C. L. O. 18.

151. Annual expenditure must be made upon placer claims as well as upon lode claims. Circular, March 24, 1887, 8 L. D. 505.

152. Assessment work is required on placer claims. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Jackson v. Roby, 109 U. S. 440; Carney v. Arizona M. Co., 65 Cal. 40; 2 Pac. Rep. 734.

153. Improvements made before the location of the claim should not be considered as having been made for its development in the absence of a clear showing of such fact. Trickey Placer, 7 L. D. 52.

154. Improvements made on a lode location afterwards relocated by the same party as a placer claim may be considered as done for the placer claim in an *ex parte* case. Com'r to Harrison Office, Feb. 24, 1892.

155. The fact that a part of the required $500 expenditure was made on the land before its location as a mining claim, while held under the agricultural law, does not affect the validity of an entry. Clark v. Taylor, 20 L. D. 455.

156. Prospect work done looking for lodes may be considered as done for the development of a placer subsequently located on the same ground. United States v. Iron Silver M. Co., 24 Fed. Rep. 568.

157. Where a mineral entry of a placer claim taken by legal subdivisions has been canceled as to that portion of the claim on which the discovery and improvements are situate, no further time will be allowed within which to make a discovery on every twenty-acre tract remaining or to make an expenditure of $500 thereon, as the location of the claim without such discovery was invalid. Departmental decision of May 20, 1896, *In re* Eliza Sweeney.

158. Proof of $500 expenditure upon a placer claim taken by legal subdivisions may consist of the affidavit of the claimant, supported by the affidavit of one or more disinterested persons. Com'r to A. C. Johnson, Sr., Nov. 20, 1891.

159. "When a party applies for a lode claim and mill site in the same application, the act does not require that five hundred dollars shall have been expended upon the mill site, but upon the lode claim only." Com'r to Surveyor General of Colorado, March 10, 1874, 1 C. L. O. 2.

160. Where a lode claim and a mill site appurtenant thereto are embraced in one survey and in one application for patent, the survey of the mill site need not be connected with a corner of the public surveys or a United States mineral monument, if connected with the survey of the lode claim, and in such a case it is not incumbent upon the claimant to show an expenditure of $500 upon the mill site, its use or occupancy for mining or milling purposes in connection with the lode claim being sufficient to entitle claimant to ask for a patent therefor. Alta Mill Site, 8 L. D. 195.

161. Where the discovery and improvements are excluded from the entry of a mining claim, the entry will be canceled unless it

is shown that mineral has been discovered and the requisite expenditure made upon claimed ground. A reconveyance by another lode claimant of the patented excluded ground, containing the discovery of the claim applied for, will not be accepted in such a case as reinvesting title to the same in the government for the purpose of patenting it with the claim last entered. Winter Lode, 22 L. D. 362.

162. Where it appears that the ground on which are situate the discovery and improvements of an entered claim has been patented as part of another claim, the entryman may furnish proof of discovery of a lode outside of the patented conflict, and that the requisite expenditure has been made on claimed ground. Spur Lode, 4 L. D. 160.

163. An expenditure of more than $1,500 by the owners of an adjoining mine on the portion of a tunnel running through the premises embraced in an application for patent is an expenditure under the mining law upon the claim applied for. George K. Willard, 4 C. L. O. 67.

164. Relocation of abandoned placer claims is allowed where the local laws require annual expenditure thereon. J. P. Sears, 8 C. L. O. 152.

165. An expenditure of $500 is required on each separate location of twenty acres or less of placer mines. Placer Claims, 9 C. L. O. 163.

166. Five hundred dollars expenditure is required on each placer *claim*, not on each *location*. Smith Bros., 7 C. L. O. 4.

167. One hundred dollars need not be expended annually on every twenty acres of a placer claim; nor need $500 be expended on every twenty acres, nor for the benefit of every twenty acres, in order to secure a patent, where the claim was embraced in one location. Com'r to John Cowell, June 5, 1893.

168. The claim as amended is an entirety, and it is not necessary that the improvements should be upon any particular part thereof. Lincoln Placer, 7 L. D. 81.

169. Where a mining claim is adversely held by a trespasser, the claimant is relieved from the duty of performing assessment work, at least as far as the rights of such trespasser are concerned. Utah M. & Mfg. Co. v. Dickert & Meyers Sulphur Co., 6 Utah, 183; 21 Pac. Rep. 1002; Oreamuno v. Uncle Sam G. & S. M. Co., 1 Nev. 215; 1 Mor. Min. Rep. 32; Robinson v. Imperial S. M. Co., 5 Nev. 44; Slavonian M. Co. v. Vacavich, 7 Sawy. 217; 7 Fed. Rep. 331; Mills v. Fletcher, 100 Cal. 143; 34 Pac. Rep. 637; Craig v. Thompson, 10 Colo. 517; 16 Pac. Rep. 24; Erhardt v. Boaro, 2 McCrary, 141; 8 Fed. Rep. 692; 1 Mor. Min. Rep. 452; 113 U. S. 527; 4 Mor. Min. Rep. 432.

170. As between parties, failure to perform annual labor by the original locator might be excused on the ground of threats made by the other, but the threats must be such as would reasonably have a deterrent effect. Slavonian M. Co. v. Vacavich, 7 Sawy. 217; 7 Fed. Rep. 331.

171. The fact that no work is done on a mining claim during the year will not operate as an abandonment where the claim is adversely held by a trespasser. Mills v. Fletcher, 100 Cal. 143; 34 Pac. Rep. 637.

172. The owner of a placer mining claim does not forfeit his right thereto, so as to render it subject to relocation, by a failure to perform the annual assessment work during a time when adverse possession is held by another, where he commences action for its recovery within the statutory time. Trevaskis v. Peard, 44 Pac. Rep. 246 (Cal.).

173. The amount paid for performance of annual labor is not conclusive of its value, but is properly admissible in evidence. Quimby v. Boyd, 8 Colo. 194; 6 Pac. Rep. 462.

174. "In estimating the amount of work or improvements, the test is the reasonable value thereof." Mattingly v. Lewisohn, 8 Mont. 259; 35 Pac. Rep. 111.

175. Hearings may be had to determine whether the $500 expenditure has been made on a mine for which patent is desired. George K. Willard, 4 C. L. O. 67; Clark v. American Flag G. M. Co., 7 C. L. O. 5.

176. A hearing should be ordered upon a protest of one alleging non-compliance by an entryman with the law relating to discovery, expenditure, and notice of application for patent. Weinstein v. Granite Mountain M. Co., 14 L. D. 68.

177. The location need be marked only once if the locator remains in possession and does the work necessary to maintain his location. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

178. Annual expenditure is not required upon mines within the limits of the Sutro Tunnel grant (Nevada). Sutro Tunnel Co., 8 C. L. O. 54.

179. A party who makes a large expenditure upon a mining claim will not be excused from making the annual expenditure. Com'r to W. S. Merrill, 5 C. L. O. 5.

180. The good judgment of a mining claimant in working his claim by any legitimate means will not be questioned by a court. Stone v. Bumpus, 46 Cal. 218; 4 Mor. Min. Rep. 278.

181. It must be clearly shown that the improvements counted as a part of the required expenditure upon a claim were made for the benefit of the claim applied for. John Downs, 7 L. D. 71.

182. A regulation of a mining district requiring more work to be done to hold a claim than is required by the United States law is void. Original M. Co. v. Winthrop M. Co., 60 Cal. 531.

183. State laws or local regulations cannot relieve mine holders from the requirement of the United States laws with regard to annual expenditures for the benefit of claims. Sweet v. Webber, 7 Colo. 443; 4 Pac. Rep. 752; 4 West Coast Rep. 116.

184. Local regulations requiring certain assessment work to be done on each location, held not to mean that it must be done on every two hundred feet of the entire claim held by several persons, but on the whole claim, irrespective of the number of locations or feet. Leet v. John Dare S. M. Co., 6 Nev. 218; 4 Mor. Min. Rep. 487.

185. Courts must construe local mining rules and customs, and require owners of mining ground to develop and work it if consistent with law. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

186. When the regulations of a mining locality require that every mining claim shall be worked two days in every ten, *held*, that the efforts of the owner to procure machinery for working the claim are by fair intendment to be considered as work done on the claim. Packer v. Heaton, 9 Cal. 568; 4 Mor. Min. Rep. 447 (1858); McGarrity v. Byington, 12 Cal. 426 (1859); 2 Mor. Min. Rep. 311.

187. Expenditures and improvements made upon or for the development of several claims or lodes cannot be credited to any one of such claims, as to do so would be to credit the one "with work done and expenditures made in part for other claims or lodes." Alice Edith Lode, 6 L. D. 711.

188. In a suit to determine conflicting mining claims to public land under section 2326, United States Revised Statutes, if there has been no work done by either claimant, plaintiff or defendant, on the premises in controversy, the finding should properly be against both. Jackson v. Roby, 109 U. S. 440.

189. A mining patent proves that the land is mineral; that the location was valid; that $500 had been expended for development, and all other things necessary done. Stark v. Starr, 6 Wall. 418; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 678; Last Chance M. Co. v. Tyler M. Co., 15 U. S. App. 456; Eureka Cons. M. Co. v. Richmond M. Co. (Eureka Case), 4 Sawy. 309; 9 Mor. Min. Rep. 578; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

190. Continuous possession and performance of annual assessment work are sufficient to disprove a charge of abandonment. Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 183.

191. Where mining property has been developed by the courage and energy and at the expense of defendants until it has become of enormous value, courts will look with disfavor upon the claims of a party thereto who has lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of such a party's rights. Johnson v. Standard M. Co., 148 U. S. 360.

192. A claim is an entirety, and it need not be shown that improvements are situate upon any particular portion of the claim, where it has been enlarged by amendment of the location. Lincoln Placer, 7 L. D. 81.

193. Assessment work was not done on a claim, though one owner promised to see that it was done. A third person, in collusion with the owner by whose fault abandonment occurred, relocated and applied for patent. The other owner in the original location adversed the application. *Held*, that he had no grounds for adversing, but should file a bill in equity against the applicant to have him declared trustee. Doherty v. Morris, 11 Colo. 12; 16 Pac. Rep. 911.

194. A. enters into a contract with B., his co-tenant, who promises to do annual assessment work. A.'s interest is forfeited if work is not done; the claim becomes subject to relocation, and a valid relocation may be made by B. A.'s remedy is an action for breach of contract, or to establish and enforce a trust in the claim as relocated. Saunders v. Mackey, 5 Mont. 523; 6 Pac. Rep. 361.

195. A preference right to purchase coal land depends upon priority of possession and improvement, followed by proper filing and development. Bullard v. Flanagan, 11 L. D. 515.

196. A coal declaratory statement, which section 2328, United States Revised Statutes, provides may be filed by "any person or association of persons, severally qualified as above provided, who have opened and improved or shall hereafter open and improve any coal mine, or mines upon the public lands, and shall be in actual possession of the same," may also be filed by one in possession who has purchased the possessory right and improvements of another. Swain v. Kearney, 22 L. D. 306.

197. On the relinquishment of a coal declaratory statement, the improvements made by the declarant inure to the benefit of one asserting a valid adverse claim to the land under the coal land law at the date of such relinquishment. Ouimette v. O'Connor, 22 L. D. 538.

198. Where, before the survey of the land, a coal claimant locates a claim in his individual capacity and another adjoining claim as agent for a company, and it is shown by the government survey that the improvements made by said company are upon land claimed by the individual, such improvements inure to the benefit of his claim. Curtis v. Songer, 22 L. D. 11.

199. The final decision, under judicial proceedings, that the claimant is not entitled to any credit for work done on the claim, renders it necessary that the supplementary evidence should clearly show that the value of the improvements or labor done upon or for the development of the claim since the date of said proceedings is not less than $500. James D. Rankin, 7 L. D. 411.

200. Although the burden of proving forfeiture is upon one relying upon the same, he has made out a *prima facie* case by showing no work to have been done *on* the claim, and if the party denying the forfeiture relies on work done *outside* of the claim, it devolves upon him to show such work to have been done for the benefit of the claim. Hall v. Kearney, 18 Colo. 505; 33 Pac. Rep. 373.

201. The fact that the claimant has not paid for labor done on his claim is immaterial if it was done at his instance. Lockhart v. Rollins, 2 Idaho, 503; 21 Pac. Rep. 413; Coleman v. Curtis, 12 Mont. 301; 30 Pac. Rep. 266.

202. Applications for patent require the preliminary showing of compliance with the expenditure requirement of section 2324, United States Revised Statutes, or resumption of work so as to prevent relocation for abandonment. Good Return M. Co., 4 L. D. 221.

203. Before making a mineral entry the claimant must show performance of assessment work on his claim or resumption of work thereon. Circular, Dec. 14, 1885, 4 L. D. 374.

204. At the date of filing an application for mineral patent, the claimant must show either that assessment work has been done for the pending year, or that work has been resumed on the claim. John Kinkaid, 5 L. D. 25.

205. Proof of annual work or resumption of work must be furnished by applicants. Circular, May 21, 1889, 8 L. D. 516.

206. Where a mineral entry was allowed on insufficient evidence of compliance with the law in the matter of expenditure upon the claim, supplemental evidence of compliance with the law may be submitted in the absence of a protest or adverse claim. James D. Rankin, 7 L. D. 411.

207. The fact that a part of a mining location on which were situate the improvements was, after location, patented to an agricultural claimant, does not render the location invalid, at least as to a subsequent locator not claiming under the agricultural patentee. Richards v. Wolfing, 98 Cal. 195; 32 Pac. Rep. 971.

208. Land which is known as a present fact to contain mineral in such quantities as will justify expenditure in working it is mineral land within the meaning of the law. Departmental decision of March 27, 1896, *In re* Hull v. Livesay.

209. In an action to recover possession of a mining claim, plaintiff must prove some title superior to that of defendant by a preponderance of evidence, but need not prove right to a patent by requisite expenditures. Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795.

210. Where a mining claim is located upon an Indian reservation and the locator is in possession at the date the reservation is thrown open, "with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, he could, by adopting what had been done, causing a proper record to be made, and performing the amount of labor or making the improvement necessary to hold the claim, date his rights from that day; and that such location and labor and improvements would give him the right of possession." Noonan v. Caledonia M. Co., 121 U. S. 393. (Affirming 3 Dak. 189; 14 N. W. Rep. 426.)

ENTRY.

I. THE STATUTE.
II. REGULATIONS.
III. DECISIONS.

I. THE STATUTE.

(See sec. 2325, U. S. Rev. Stat., p. 187.)

II. REGULATIONS.

42. Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, permit the claimant to pay for the land according to the area given in the plat and field notes of survey aforesaid, at the rate of five dollars for each acre and five dollars for each fractional part of an acre, the receiver issuing the usual duplicate receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office; after which the whole matter will be forwarded to the Commissioner of the General Land Office and a patent issued thereon if found regular.

44. The consecutive series of numbers of mineral entries must be continued, whether the same are of lode or placer claims or mill sites.

93. A party who is not an applicant for patent under section 2325, Revised Statutes, or the assignee of such applicant, is not entitled to make entry under such section, and in no case will the name of such party be inserted in the certificate of entry. This regulation has no reference to proceedings under section 2326.

94. Any party applying to make entry as *trustee* must disclose fully the nature of the trust and the name of the *cestui que trust;* and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

95. No entry will be allowed until the register has satisfied himself, by a careful examination, that proper proofs have been filed upon all the points indicated in official regulations in force, and that they show a sufficient *bona fide* compliance with the laws and such regulations.

III. DECISIONS.

1. "The miner having located his claim, is to be treated as an express licensee of the United States, and independent of a purchase from the government of his mining claim, he has, upon compliance with the terms of the act, a right to appropriate the minerals therein contained. A title in fee by patent is offered him, which he may at his pleasure accept or reject." There is no time prescribed within which he shall apply for a patent. Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

2. The locator of a mining claim need not purchase from the United States until he so wishes, but may continue to hold under his possessory title so long as he complies with the law in the matter of annual expenditures upon the claim. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 188; Chapman v. Toy Long, 4 Sawy. 28; 1 Mor. Min. Rep. 497; United States v. Nelson, 5 Sawy. 68; 14 Mor. Min. Rep. 381; Black v. Elkhorn M. Co., 52 Fed. Rep. 859; Smith v. Van Clief, 6 C. L. O. 2.

3. After a legal entry of public land whereby the entryman becomes entitled to a patent, he holds the equitable title, and the United States thereafter holds the naked legal title in trust for him until patent issues. Carroll v. Safford, 3 How. 441; Witherspoon v. Duncan, 4 Wall. 210; Hughes v. United States, 4 Wall. 232; Wirth v. Branson, 98 U. S. 118; Deffeback v. Hawke, 115 U. S. 392; Cornelius v. Kessel, 128 U. S. 456; Dahl v. Raunheim, 132 U. S. 260; Benson M. & Sm. Co. v. Alta M. & Sm. Co., 145 U. S. 428; Bigelow v. Chatterton, 10 U. S. App. 267; Union M. & M. Co. v.

Danberg, 2 Sawy. 450; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348; Hamilton v. Southern Nevada M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314; Amador-Medean G. M. Co. v. South Spring Hill G. M. Co., 13 Sawy. 523; Astrom v. Hammond, 3 McLean, 107; Carroll v. Perry, 4 McLean, 26; United States v. Freyberg, 32 Fed. Rep. 195; Jones v. United States, 35 Fed. Rep. 561; Montgomery v. United States, 36 Fed. Rep. 4; Gwynne v. Niswanger, 15 Ohio, 368; People v. Shearer, 30 Cal. 648; Ross v. Supervisors, 12 Wis. 38; Deno v. Griffin, 20 Nev. 249; 20 Pac. Rep. 308; Goodlet v. Smithson, 5 Port. (Ala.) 246.

4. A legal entry of public land vests the equitable title thereto in the entryman, the United States thereafter holding the legal title in trust for the entryman until a patent issues, and this right cannot be defeated by an order of the Land Department, issued without warrant of law, canceling the entry. Cornelius v. Kessel, 128 U. S. 456.

5. The issuance of the certificate of purchase on payment for the land to the United States (making of an entry) vests equitable title in the entryman. The patent when issued relates back to the date of the entry upon which it is based. Bagnell v. Broderick, 13 Pet. 450; Gibson v. Choteau, 13 Wall. 93; Shepley v. Cowan, 91 U. S. 330; Heydenfeldt v. Daney G. & S. M. Co., 93 U. S. 634; 13 Mor. Min. Rep. 204; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Steel v. St. Louis Sm. Co., 106 U. S. 447; Deffeback v. Hawke, 115 U. S. 392; Astrom v. Hammond, 2 McLean, 107; Hayner v. Stanley, 8 Sawy. 225; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348.

6. Patent relates back to date of entry. Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Sawy. 355; 35 Fed. Rep. 515; 15 Mor. Min. Rep. 581; Coleman v. Peshtigo Lumber Co., 30 Fed. Rep. 317; Blackley v. Coles, 6 Colo. 350; Poire v. Wells, 6 Colo. 406; City of Denver v. Mullen, 7 Colo. 345; Omaha & Grant Sm. & Red. Co. v. Tabor, 13 Colo. 41; 21 Pac. Rep. 925; Struby-Esterbrook Co. v. Davis, 18 Colo. 93.

7. After entry land may be taxed by the State. Alta M. & Sm. Co. v. Benson M. & Sm. Co., 16 Pac. Rep. 565; Courchainer v. Bullion M. Co., 4 Nev. 374; Brown v. Warren, 16 Nev. 229; Deno v. Griffin, 20 Nev. 249; 20 Pac. Rep. 308; F. P. Harrison, 2 L. D. 767.

8. When, between the dates of making mineral entry and issuance of patent, the entryman sells the claim, the grantee holds under the patent, which relates back to the date of entry. Brown v. Warren, 16 Nev. 229.

9. When the purchase is completed and the certificate issued. the purchaser at once acquires a vested right, of which he cannot be subsequently deprived, and the land ceases to be a part of the public domain. There is a part performance of the contract, which entitles the purchaser to a specific performance of the whole, without further action on his part. F. P. Harrison, 2 L. D. 767.

10. When an original purchaser of mining lands has complied with the legal requirements and obtained a patent certificate from the government, he has acquired a vested right in the land — a legal estate that can be recovered in an action of ejectment. Such an action is not subject to the Statute of Limitations of Oregon, which is intended to apply to lands still subject to governmental disposition. Rader v. Allen, 27 Oreg. 344; 41 Pac. Rep. 154.

11. A certificate of mineral entry may not be collaterally assailed any more than can be a patent. Hamilton v. Southern Nevada G. & S. M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314.

12. It is a general rule of law that a certificate of entry, like a patent, is conclusive of legal title; but this rule will not be followed where entry was made by the defendant in an adverse suit after the dismissal of such suit, where the suit was thereafter reinstated, and the cause will be tried as though it never had been dismissed. McEvoy v. Hyman, 25 Fed. Rep. 539; 15 Mor. Min. Rep. 300.

13. In Federal courts a certificate of entry of land may not be considered as evidence of the holder's legal title, as the making of entry vests only equitable title in the entryman. Langdon v. Sherwood, 124 U. S. 74.

14. The signature of the Register must be first proved in order to admit in evidence a Register's final certificate of entry. Jackson v. McMurray, 4 Colo. 76; 12 Mor. Min. Rep. 164.

15. A mineral entry, so long as it remains uncanceled, confers the same right as a United States patent, being *prima facie* evidence that the entryman is entitled to a pat-

ent. Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515: 15 Mor. Min. Rep. 581; Hamilton v. Southern Nevada M. Co., 13 Sawy. 113; 33 Fed. Rep. 566; Benson M. & Sm. Co. v. Alta M. & Sm. Co., 145 U. S. 428; Last Chance M. Co. v. Tyler M. Co., 61 Fed. Rep. 557; 15 U. S. App. 456.

16. The cancellation of a mineral entry does not in itself render the ground subject to relocation, as the cancellation has no effect on claimant's possessory right. McGowan v. Alps Cons. M. Co., 23 L. D. 113.

17. A relocation of a mining claim embraced in a subsisting mineral entry will not confer any rights upon the relocator. F. P. Harrison, 2 L. D. 767; Good Return M. Co., 4 L. D. 221; Smuggler M. Co. v. Trueworthy Lode, 19 L. D. 356.

18. A location of land covered by a mineral entry is *void*, notwithstanding the alienage of the entryman, the entry while it remains of record being a segregation of the land; and such a location would not give the locator even the right of appeal from a decision dismissing his protest. Leary v. Manuel, 12 L. D. 345.

19. The effect of an entry as regards third parties is not altered by reason of a defect in the survey which caused a temporary suspension of the entry by the Land Department. Last Chance M. Co. v. Tyler M. Co., 61 Fed. Rep. 557; 15 U. S. App. 456; 157 U. S. 683.

20. The Commissioner of the General Land Office has authority to cancel an entry illegally allowed. "The exercise of this power is necessary to the due administration of the Land Department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the Department." Cornelius v. Kessel, 128 U. S. 456. (Citing Barnard's Heirs v. Ashley's Heirs, 18 How. 45; Bell v. Hearne, 19 How. 252; Harkness v. Underhill, 1 Black, 316; Marquez v. Frisbie, 101 U. S. 473; United States v. Schurz, 102 U. S. 373; Steel v. St. Louis Sm. Co., 106 U. S. 447; Hestres v. Brennan, 50 Cal. 211; Randall v. Edert, 7 Minn. 450; Gray v. Stockton, 8 Minn. 529; Ferry v. Street, 11 Pac. Rep. 571; Darcy v. McCarthy, 12 Pac. Rep. 104; Pierce v. Frace, 26 Pac. Rep. 192; Jones v. Mayers, 2 Idaho, 724; 26 Pac. Rep. 215; Judd v. Randall, 29 N. W. Rep. 589; Forbes v. Driscoll, 31 N. W. Rep. 633; Vantongeran v. Hefferman, 38 N. W. Rep. 52; Parsons v. Venzke, 4 N. Dak. 452; 61 N. W. Rep. 1036.)

21. A decision of the Secretary affirming the judgment of cancellation by the Commissioner is a judgment of cancellation. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

22. The Land Department may inquire into the validity of an entry and may cancel it if improperly allowed. German Insurance Co. v. Hayden, 40 Pac. Rep. 453.

23. The Land Department may not cancel an entry even on contest had. Smith v. Ewing, 11 Sawy. 56; 23 Fed. Rep. 741; Wilson v. Fine, 14 Sawy. 224; 40 Fed. Rep. 52; Stimson v. Clark, 45 Fed. Rep. 760: American Montana Co. v. Hopper, 48 Fed. Rep. 47.

24. A purchaser of land after entry, but before issuance of patent, is simply the assignee of an equitable interest, and as such takes with notice of all defects in the title purchased. Hence he cannot be considered an innocent purchaser, in a legal sense. R. M. Chrisinger, 4 L. D. 347; William E. McIntyre, 6 L. D. 503; C. A. Kibling, 7 L. D. 327; Murphy v. Sanford, 11 L. D. 123; United States v. Miller, 14 L. D. 617.

25. The Secretary of the Interior exercises a supervisory authority over the Commissioner of the General Land Office, who, in turn, exercises the same authority over the local land officers. A purchaser of land after entry and before the issuance of patent takes subject to the re-examination of the entry and its possible cancellation. Sweigart v. Walker, 30 Pac. Rep. 162.

26. Before an entry is canceled, the claimant must be given his day in court by allowing him to show cause why the entry should not be canceled. Departmental decision, April 16, 1894, *In re* Southgate v. Po Ka Tah Kum; Senator Mill Site, 7 L. D. 475; Neal v. McMullen, 9 L. D. 522; Vanderbilt Lode, 16 L. D. 105.

27. A Commissioner's order canceling an entry on the contest to which the entryman had not been cited as required by Departmental practice is a nullity. Risdon v. Davenport, 4 S. Dak. 555.

28. A mineral entry canceled without proper notice to the entryman will be reinstated notwithstanding the intervention of an adverse claim by relocation of the ground

after the cancellation. McGowan v. Alps Cons. M. Co., 23 L. D. 113.

29. The cancellation of an entry without service on the claimant by the Land Department is void. Young v. Hanson, 64 N. W. Rep. 654.

30. A mineral entry should not be canceled upon the report of a special agent that claimant has not complied with the law and that the mining claim is valueless as such, but a hearing should be ordered by the General Land Office. Franklin L. Bush, 2 L. D. 788.

31. A decision of the local office "that the entry is held for cancellation subject to the right of further appeal," is not, when offered in evidence upon trial of adverse suit, open to the objection that it does not cancel, but merely recommends cancellation. The effect of a decision of this kind is not destroyed by the use of such language. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

32. Where a mineral entry is allowed, and it is shown at a hearing that the plat and the notice of application for patent were hidden upon the claim instead of being posted in a conspicuous place thereon, the entry will be canceled without prejudice to claimant's right to begin proceedings *de novo* to acquire patent. Pratt v. Avery, 7 L. D. 554.

33. The allowance of a mineral entry for land covered by an existing mineral entry is erroneous, but the second may be allowed to stand if the prior entry has been canceled for failure to give proper notice (and, apparently, the first entryman will be given no opportunity to adverse the application of the second entryman). Moss Rose Lode, 11 L. D. 120.

34. In requiring an amended survey of an entered mining claim, the General Land Office should direct that claimant be allowed a certain time within which to take proper steps, under penalty of cancellation of the entry. Vanderbilt Lode, 16 L. D. 105.

35. A mineral entry should not be canceled for failure to comply with a requirement of the land office unless the record shows notice of such requirement to have been given the entryman. San Juan Placer, 12 L. D. 125.

36. A mineral entry will be canceled when it appears that the claim is not known to be valuable for mineral and is not taken for mining purposes. Trickey Placer, 7 L. D. 52.

37. A mineral entry of lands covered by a cash entry, though irregularly allowed, may be allowed to stand where the cash entry has been canceled. Dobbs Placer, 1 L. D. 565.

38. Where, after publication of notice of application for patent and before entry, a mining claim is relocated by a stranger, for failure on part of the applicant to make the required annual expenditure, and such failure and relocation are shown at a hearing, the entry will be canceled and the parties left to litigate their conflicting claims in court. The Land Department will not pass upon the validity of the relocation in such a case. Little Pauline Lode v. Leadville Lode, 7 L. D. 506.

39. A mineral entry should not be canceled because the entryman claims by transfer from a local land officer by whom the claim was located, where the entryman and the officer acted in good faith. Rust and Criteser, 2 L. D. 754.

40. A coal entry should not be canceled for failure to furnish proof not required by the Land Department regulations in force at date of the entry. Durango Land & Coal Co., 18 L. D. 382.

41. If the General Land Office holds an entry for cancellation on insufficient grounds and cancels it on failure of claimant to appeal, the rights of the entryman are lost if another right attaches after cancellation. Roberts v. Gebhart, 104 Cal. 67.

42. The cancellation of a mineral entry has for its effect simply to set aside all that has been done by the claimant toward the acquisition of a patent and relegates him to his possessory title. John R. Magruder, 1 L. D. 526.

43. A judgment canceling an entry takes effect on date of rendition by the Secretary of the Interior or by the Commissioner of the General Land Office. John H. Reed, 6 L. D. 563; Barclay v. State, 6 L. D. 699; Anderson v. Railway Co., 7 L. D. 163; Dahlstrom v. St. P. etc. R. R. Co., 12 L. D. 59; Perrott v. Connick, 13 L. D. 598; Lough v. Ogden, 17 L. D. 171; McDonald v. Hartman, 19 L. D. 547; Oettel v. Dufur, 22 L. D. 77.

44. The entryman should be notified of the order of cancellation of his entry. San Juan Placer, 12 L. D. 125.

45. A canceled entry may be reinstated if the owners at date of cancellation were not notified of requirements of the land office.

Com'r to Leadville Office, Nov. 16, 1895, *In re* Eureka Lode.

46. Where a mineral entry has been properly canceled, after service upon the claimant of record, the reinstatement thereof rests in the discretion of the General Land Office, and will be denied in the presence of an intervening adverse right. No appeal will lie from such denial. Com'r to Leadville Office, May 14, 1896, La Plata Blanco Lode.

47. A mineral entry, canceled upon an erroneous report of the local office to the effect that claimant had taken no action within the time allowed, should be reinstated upon its being shown that proper action was taken. Fleetwood Lode, 12 L. D. 604.

48. If an entry was erroneously canceled it should be reinstated. F. P. Harrison, 2 L. D. 767; Com'r to Montrose Office, Nov. 12, 1895.

49. A canceled entry may be reinstated before the proof is perfected if it was canceled without proper service on the claimant. Com'r to Leadville Office, Oct. 16, 1895, *In re* Alps No. 2 Lode; Com'r to Leadville Office, Nov. 19, 1895, *In re* Magenta Lode.

50. If a mineral entry has been canceled because of defects in the proof, it may be reinstated if the record is perfected, in the absence of any intervening adverse right. Com'r to Denver Office, Oct. 9, 1895, *In re* Hubert Extension Lode; Com'r to Denver Office, Oct. 10, 1895, *In re* Juno Lode & Mill Site.

51. A canceled entry will not be reinstated in the face of an intervening adverse right even if the cancellation were erroneous. Merritt v. Philp, 16 L. D. 404; Pehling v. Brewer, 20 L. D. 368.

52. A canceled entry will not be reinstated for the benefit of a transferee guilty of laches, in the presence of an intervening adverse right. United States v. Hanley, 19 L. D. 186.

53. If an entry is canceled after due service of notice, it will not be reinstated in the face of an intervening relocation of the claim, even if the original requirements were erroneous. Com'r to Leadville Office, June 19, 1896, *In re* Quartzite Lode.

54. A canceled mineral entry will not be reinstated by the General Land Office if the claim has been relocated after cancellation of the entry and before application for reinstatement. Com'r to Las Cruces Office, June 4, 1896, *In re* Juniata Lode.

55. The policy of the law is to require all rights and equities in the premises sought to be purchased and patented to be adjusted prior to the issuance of patent, to the end that it may be impregnable against all comers. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; 420 M. Co. v. Bullion M. Co., 3 Sawy. 634; 9 Nev. 240; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608; Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 9 Mor. Min. Rep. 578; Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178; Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77. (Affirmed, 13 Colo. 174; 22 Pac. Rep. 436.) Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 320; 1 Mor. Min. Rep. 120; 15 Nev. 450.

56. After the allowance of entry, one who has failed to file an adverse claim will not be heard to attack the validity of the location of the claim entered because of his own prior location, as he should have asserted his right in the manner prescribed by section 2326, United States Revised Statutes. Warren Mill Site v. Copper Prince Lode, 1 L. D. 555.

57. Failure of one alleging an adverse interest to file an adverse claim does not estop him from appearing as a protestant to secure cancellation of the entry for non-compliance with law. Nevada Lode, 16 L. D. 532.

58. An adverse claimant, whose adverse suit has been dismissed, cannot complain of the fact that entry was made and patent issued during pendency of such suit, and the validity of the patent is not affected by such irregularity. Deno v. Griffin, 20 Nev. 249; 20 Pac. Rep. 308.

59. During the pendency of a suit based upon an adverse claim filed by a placer claimant against an application for patent for a lode claim, entry may not be allowed upon said application. Clipper M. Co., 23 L. D. 527.

60. Where two co-owners of a mining claim file an adverse against an application for patent, and institute separate suits thereon, in different courts, the Land Department will not allow entry upon the application inclusive of the conflict during the pendency of either of said suits. Black Queen Lode v. Excelsior No. 1 Lode, 23 L. D. 348.

61. On the termination of suit on an adverse claim, any entry made must conform to

the judgment rendered. Hence, entry should not be allowed until a copy of the judgment roll is filed in the local land office. Silver King Lode, 14 L. D. 308.

62. A. may apply for patent to a mining claim, exclusive of a portion thereof involved in an adverse suit brought by him against B., a prior applicant, without thereby waiving any right to the excluded portion, and if, on such suit, the land is awarded to A., he may then make entry of his entire claim, based on his application as to one part and on his judgment as to the other. Rebellion M. Co., 1 L. D. 542.

63. If an adverse claim is filed against an application for patent for two contiguous claims, directed against only one of said claims, the applicant may make entry of the claim not covered by the adverse. Com'r to Marysville Office, July 10, 1896.

64. A mineral claimant may temporarily exclude part of his claim from his application to purchase and entry without waiving his right thereto, if such exclusion be caused by assertion of adverse rights. Aspen Cons. M. Co., 22 L. D. 8. (Citing Branagan v. Dulaney, 2 L. D. 744.)

65. A mineral entry erroneously allowed pending a suit on an adverse claim may be allowed to stand where the entryman has secured judgment in his favor on such suit. Gunnison Crystal M. Co., 2 L. D. 722.

66. A mineral entry allowed during the pendency of an adverse suit against the applicant need not be canceled, but may remain suspended to await the determination of said suit. Meyer v. Hyman (on review), 7 L. D. 336. (Revoking Meyer v. Hyman, 7 L. D. 83.)

67. An entry allowed upon an application against which an adverse suit is pending will be canceled. Brown v. Bond, 11 L. D. 150.

68. In an action upon an adverse claim, where plaintiffs, as evidence of their title, had introduced the receiver's receipt for the entry thereof, it is admissible for the defendants to prove by decisions of the Land Department that the receipt had been canceled and set aside on the protest against the issuance of patent. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

69. Entry is not prevented by the pendency of a suit brought upon an invalid adverse claim, or not brought within thirty days from filing of the adverse claim in the land office. Nettie Lode v. Texas Lode, 14 L. D. 180.

70. The allowance of a mineral entry during the pendency of an adverse suit has no effect on a patent issued after termination of such adverse suit in favor of applicant. Deno v. Griffin, 20 Nev. 249; 20 Pac. Rep. 308.

71. An entry allowed after dismissal of an adverse suit is no bar to the reinstatement of such suit. McEvoy v. Hyman, 25 Fed. Rep. 539.

72. Where a mineral entry is allowed upon the dismissal of an adverse suit, it will be canceled upon the reinstatement of the suit. Iola Lode, 1 L. D. 539.

73. The failure of an agent who files an adverse claim, sworn to as agent, and on which suit is duly instituted, to furnish proof of agency at the time of filing the adverse claim, will not warrant the allowance of entry upon the application against which the adverse claim is filed, and an entry so allowed will be canceled. Brown v. Bond, 11 L. D. 150.

74. Entry should not be allowed where the claim applied for is involved in a pending suit to determine the right of possession thereto, instituted prior to publication of notice of application for patent. If on said suit it is adjudged that the applicant is not entitled to the possession of a part of the claim, he will not be allowed to enter such part. Northwestern Lode and Mill Site Co., 8 L. D. 437.

75. Where, by a final decision on adverse suit, it was held that neither party thereto was entitled to any credit for work theretofore done on the claim, before the applicant is allowed to make entry he should show an expenditure of $500 since the trial of said suit. J. D. Rankin, 7 L. D. 411.

76. Where entry has been made for a mining claim and thereafter an application is erroneously allowed for a conflicting claim, and the entryman of the first claim files an adverse claim against said application and begins suit thereon, all action will be suspended both upon said entry and said application during the pendency of said suit. Little Giant Lode, 22 L. D. 629.

77. Where part of the land embraced in a mineral entry is entered by virtue of a transfer thereof to the applicant by an adverse claimant who had secured a judgment there-

for, the entryman, as to that tract, stands in the place of his grantor and must show $500 expenditure thereon. Jackson M. Co., 3 L. D. 149.

78. A mineral entry may be made, based in part on the right secured by judgment and in part on the right of applicant. Gunnison Crystal M. Co., 2 L. D. 722.

79. An adverse claimant is not barred from asserting his claim by the allowance of entry without legal notice of application for patent, and where he sets up such allegation of noncompliance with law in a protest, he has such an interest as entitles him to appeal from the action of the General Land Office dismissing his protest. Bright v. Elkhorn M. Co., 8 L. D. 122.

80. An adverse claim may not be asserted under the Statute of Limitations after mineral entry has been made. Rader v. Allen, 27 Oreg. 344; 41 Pac. Rep. 154.

81. An application for a lode patent was made by A.; B., the owner of a conflicting lode claim, filed an adverse claim and commenced suit thereon, alleging a prior location of the ground in conflict. A. filed an answer, but thereafter amended the survey of his claim by so shortening it as to eliminate from it all conflict with the claim of B., and was allowed to make entry in the land office of the reduced area. He then withdrew his answer, and B., on testimony submitted, secured judgment for the land in controversy. *Held*, that the withdrawal of the answer and abandonment of the application for patent, as to the conflict did not remove the cause from the jurisdiction of the court; that, in view of the first holding, the judgment is conclusive as between A. and B. of the priority of the location of B. Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683.

82. The question at issue in a suit based upon an adverse claim is the priority of right to purchase the fee of the land involved from the government. One who already has the fee to the land is not obliged to proceed under section 2326, United States Revised Statutes. Bennett v. Harkrader, 158 U. S. 441.

83. "I apprehend, however, that the successful litigant, under said section (2326), occupies the same position as does an applicant who has given due notice of application, during which no adverse claim has been filed. In each case the rights of the claimant may be lost by abandonment any time prior to entry." Com'r to Leadville Office, Feb. 24, 1896, Kennedy v. Johnston.

84. Where, in the location certificate of a mining claim of which entry has been made, it is stated that the location is upon an abandoned claim, the entryman is not required to furnish evidence of such abandonment, as the owner of the claim alleged to be abandoned loses his rights by failure to file an adverse claim. Manhattan & San Juan S. M. Co., 2 L. D. 698.

85. A preference right to purchase coal land depends upon priority of possession and improvement, followed by proper filing and development. Bullard v. Flanagan, 11 L. D. 515.

86. "Section 2348, U. S. Rev. Stat., makes the opening and improving of a coal mine upon the public lands a condition precedent to the preference right of entry therein authorized." Departmental decision of July 1, 1896, *In re* Cummings v. Lessinger.

87. For good reasons the Land Department will expressly authorize the filing of a second coal declaratory statement, and where entry has been made, based on a second declaratory statement, the filing thereof may be authorized *nunc pro tunc*. John McMillan, 7 L. D. 181.

88. A coal declarant who has failed to purchase during the time allowed will not be given further protection under a second declaratory statement for the same land. Alfred Grunsfeld, 10 L. D. 508.

89. A second coal declaratory statement cannot be filed in the absence of a valid reason for failing to purchase under the first. Albert Eisemann, 10 L. D. 539; Walter Dearden, 11 L. D. 351; Conner v. Terry, 15 L. D. 310; McKean v. Buell, Sickel's Min. Dec. 398.

90. A second coal declaratory statement may not be filed by the same person in the absence of a valid reason for not perfecting title under the first. Conner v. Terry, 15 L. D. 310.

91. The declaratory statement of a coal claimant should be canceled at the expiration of the time allowed for purchase thereunder. Alfred Grunsfeld, 10 L. D. 508.

92. A person who has bought and sold a preference right under the coal land law is not thereby barred from making a coal entry. William H. McConnell, 18 L. D. 414.

93. Where an applicant to purchase coal lands under a declaratory statement alleges compliance with the law through his agent, and it appears that such agent is the real party in interest, the agent may be allowed to make entry as assignee of the declarant. Kerr v. Utah-Wyoming Improvement Co., 2 L. D. 727.

94. Failure to file a coal declaratory statement within sixty days from taking possession of the land, and to make entry within a year from the time allowed for such filing, renders the land subject to entry by any other person who has complied with the law. Brennan v. Hume, 10 L. D. 160.

95. Failure to perfect a coal land entry during the statutory period defeats the right so to do in the presence of an intervening adverse claim. O'Gorman v. Mayfield, 19 L. D. 522.

96. A coal entry allowed on a defective declaratory statement may, in absence of an adverse claim, be referred to the Board of Equitable Adjudication, where a proper declaratory statement is subsequently filed. Anthracite Mesa Coal Co., 19 L. D. 18.

97. A coal entry embracing eighty acres, of which but forty acres was included in the declaratory statement, the other being necessary to the working of the mine, may be allowed to stand where the entry is made in good faith. Charles H. Ackert, 17 L. D. 268.

98. A coal entry may not be made embracing one tract taken as assignee of a preference right and another in the individual right of the entryman. Charles S. Ludlam, 17 L. D. 22.

99. A coal entry cannot embrace non-contiguous legal subdivisions of land, but when made for non-contiguous tracts, in good faith, under the then existing practice may be allowed to stand. C. P. Masterson, 7 L. D. 172, 577 (on review); Kendall v. Hall, 12 L. D. 419.

100. A corporation, some of the stockholders of which had exhausted their rights under the coal land laws, procured various persons individually qualified to make entry of coal lands for the purpose of transferring title acquired by such entry to the corporation. *Held*, that the transaction was in violation of the law governing the disposal of public lands containing coal, and that patents so obtained were voidable for fraud in their procurement. United States v. Trinidad Coal & Coking Co., 137 U. S. 160. (Reversing S. C., 37 Fed. Rep. 180.)

101. Coal entries made by qualified persons at the procurement and for the benefit of an association are contrary to law and will be canceled. Adolph Peterson, 6 L. D. 371; Northern Pacific Coal Co., 7 L. D. 422; Elwood R. Stafford, 21 L. D. 200; Com'r to B. H. Dye, Sept. 21, 1891. *Contra*, United States v. Trinidad Coal & Coking Co., 37 Fed. Rep. 180. (Reversed, S. C., 137 U. S. 160; Lipscomb v. Nichols, 6 Colo. 290.)

102. A coal entry under section 2347, United States Revised Statutes, for the use and benefit of one other than the entryman, is illegal and will be canceled. Northern Pacific Coal Co., 7 L. D. 422.

103. A coal entry will not be allowed when it is sought to make the same for the benefit of one who has exhausted his right under the coal land laws. McGillicuddy v. Tompkins, 14 L. D. 633.

104. A coal entry will not be allowed on a coal declaratory statement filed in the interest of a person other than the applicant. Conner v. Terry, 15 L. D. 310.

104a. A coal entry made by one who has parted with his interest in the land is not made for the benefit of the entryman, and will be canceled. Union Coal Co., 17 L. D. 351.

105. A coal entry made for the use of one other than the entryman will be canceled. Elwood R. Stafford, 21 L. D. 300.

106. A coal entry under section 2348, United States Revised Statutes, voidable for illegality in that it was made for the use and benefit of one other than the entryman, and that coal had not been found on the land, may be passed to patent, for the benefit of a transferee, in view of the fact that the purchase-money could not be repaid because of the fraud of the entryman in submitting false proof. Gerard B. Allen, 8 L. D. 140.

107. The right to purchase land under a coal declaratory statement is not forfeited, in the absence of a valid adverse claim, by failure to make entry within the statutory period. Alfred Grunsfeld, 10 L. D. 508.

108. An applicant, to make entry of coal lands under section 2348, United States Revised Statutes, must be in actual possession of the land, and it is not sufficient to show a forcible ouster therefrom. James D. Negus, 11 L. D. 32.

109. A preference right of entry of coal lands, set up to defeat a private cash entry thereof, must be based upon actual *bona fide* occupation of the land by and for the benefit of the one claiming such right. McDaniel v. Bell, 9 L. D. 15.

110. The distance of coal land from a completed railroad at date of payment and entry must govern the price, *i. e.*, whether $10 or $20 per acre (sec. 2347, U. S. Rev. Stat.). Departmental decision of Sept. 17, 1881, Copp's Min. Lands, 345; Departmental instructions, 1 L. D. 540; Frank Foster, 2 L. D. 760; Joseph L. Colton, 10 L. D. 422; Edward B. Largent, 13 L. D. 397; Oswald C. Mortson, 16 C. L. O. 52; Departmental decision of May 10, 1892.

111. The qualification of every member is essential to the right of an association to make a coal entry. W. F. Hawes, 5 L. D. 224.

112. A patent issued upon a coal entry, which was made for land not claimed, through error of description, may be surrendered to the Land Department, the land reconveyed to the government, proof furnished of non-alienation of the land patented, and the patent may be canceled and a new patent issued after amendment of the entry. Richard Gill, 8 L. D. 303.

113. The transferee of a coal entryman, prior to issuance of patent, takes no greater right than his grantor had, *i. e.*, an equitable title, and the entry is subject to cancellation by the Land Department, just as though no transfer had been made. Scott v. Sheldon, 15 L. D. 588.

114. A coal contestant who offers to pay costs of a hearing in his contest against a coal entry, and upon whose showing the entry is canceled, has a preference right of filing upon the land even though the hearing prayed was never ordered. Garner v. Mulvane, 12 L. D. 336.

115. "It seems clear that this proviso [to sec. 2348, U. S. Rev. Stat.] means that where an association has expended $5,000 or more in working and improving a coal mine or mines, then, in consideration of such expenditure, the association may enter by legal subdivisions not to exceed six hundred and forty acres of land, including the legal subdivisions of the land on which the mining improvements are actually situated, irrespective of whether the land covered by the improvements is coal land or agricultural land." McWilliams v. Green River Coal Ass'n, 23 L. D. 127. (Citing Rucker v. Knisley, 14 L. D. 113; Hamilton v. Anderson, 19 L. D. 168.)

116. The requirements of the General Mineral Circular issued by the Land Department do not apply to entries under the coal land laws. W. H. Mosley, 6 L. D. 620.

117. The law of August 30, 1890 (26 Stat. 371), limiting the area enterable under the land laws to three hundred and twenty acres, applies to entries under the mining and coal land laws. The general rule of approximation in area should apply under this law. Com'r to Helena Office, Oct. 17, 1890, 17 C. L. O. 231. Section 17 of the Act of March 3, 1891 (26 Stat. 1095), provides that this limitation shall not apply to the entry of mineral lands.

118. When money was left on deposit with a former receiver on account of a mining claim, but was not accounted for or covered into the treasury, his successor in office is not chargeable, nor may it be credited on the entry on account of which it was deposited. Lady Bryan S. M. Co., 2 L. D. 637.

119. Where a mineral entry is allowed upon insufficient notice of application for patent, and is therefore canceled, the price paid for the land and the ten dollar fee paid at date of filing the application for patent will be repaid. John R. Magruder, 1 L. D. 526.

120. Repayment of purchase money paid in making a coal entry will not be made where the entry has been canceled for fraud. D. A. Mulvane, 15 L. D. 146; Mary McM. Latham, 20 L. D. 379 (mineral entry).

121. The allowance of mineral entry for a mill site under the first clause of section 2337, United States Revised Statutes, without proof of the use or occupancy of the land for mining or milling purposes, is erroneous; and, upon cancellation of the entry as to the mill site, the purchase money should be repaid. Hudson M. Co., 14 L. D. 544.

122. Where a mineral entry has been canceled, the purchase price may not be applied upon a second entry of the land by the same parties; but the purchase money must be paid upon the second entry as in the first instance. Claimants must seek relief by asking repayment of the money paid on the first entry. Com'r to Leadville Office, Sept. 12, 1896.

123. Mineral lands cannot be entered with Sioux Half Breed Scrip. Com'r to Z. V. Bogg, Feb. 28, 1895.

124. Nor with Porterfield Scrip. Com'r to Secretary, Aug. 24, 1876.

125. Nor with Agricultural College Scrip. Com'r to Fairplay Office, Jan. 30, 1878.

126. Nor with a certificate of deposit. Secretary, Sept. 22, 1877.

127. Although under the law and regulations notice of application should be posted both upon a lode claim and a mill site embraced in one application for patent, where by oversight notice was not posted on the mill site, the entry may be passed to patent. John W. Bailey and Grand View M. & Sm. Co., 3 L. D. 386. But see: An entry of a lode and mill site defective in that notice of application for patent was not posted upon the mill site may be referred to the Board of Equitable Adjudication. New York Lode and Mill Site, 5 L. D. 518.

128. Where by a typographical error the line connecting the claim with a public survey corner was published as 2552.2 feet in length, instead of 2252.2 feet, the mineral entry may be referred to the Board of Equitable Adjudication. Newport Lode, 6 L. D. 546.

129. Where by error in the survey of a mining claim the line connecting the claim was so erroneous as to place the claim about half a mile from its true position, it was held that the mineral entry should be referred to the Board of Equitable Adjudication without requiring republication of notice of application. Buena Vista Lode, 6 L. D. 646; Veta Grande Lode, 6 L. D. 718.

130. A mineral entry may be referred to the Board of Equitable Adjudication where posting of plat and notice of application for patent was not made on the claim owing to inaccessibility and danger of snow slides, but in a conspicuous place on an adjoining claim. Rowena Lode, 7 L. D. 477.

131. Where an entry is defective in that proper posting of notice of application and plat upon the claim is not shown, the claimant should be allowed to give new notice by publication and posting. Cornell Lode, 6 L. D. 717.

132. Any defect in the published notice of application for a mineral patent is chargeable to the Register, whose duty it is to prepare and publish the same, and an entry may be referred to the Board of Equitable Adjudication, where such notice is defective in failing to connect the claim with the corner of the public surveys or a United States mineral monument. Mimbres M. Co., 8 L. D. 457.

133. A notice of application for a mineral patent that fails to connect the claim with the public surveys or a United States mineral monument is insufficient, and an entry allowed on such notice may not be referred to the Board of Equitable Adjudication in the presence of a protest of persons alleging adverse claims, but republication of notice will be required. Nil Desperandum Placer, 10 L. D. 198.

134. Where the notices of application for patent were sufficiently definite in the matter of description of the claim to cause an adverse claim to be filed, republication of notice will not be required because of an error in the survey of ten degrees in the course and three chains in the length of the line connecting the survey of the claim with a corner of the public surveys, but the entry may be referred to the Board of Equitable Adjudication. Walter C. Childs, 10 L. D. 173.

135. A mineral entry may be referred for confirmation to the Board of Equitable Adjudication, where the *locus* of the claim was not shown in the published notice by a line connecting the claim with the public surveys. Silver King Quartz Mine, 11 L. D. 234.

136. Claimant who has published a notice of application for patent may not, by relinquishment, give to a claimant of a conflicting claim the right to enter the conflict without publication. Com'r to Pueblo Office, Jan. 17, 1896, *In re* Providence Lode. *Contra*, Com'r to Glenwood Springs Office, July 23, 1896, Big Chief Lode (special case).

137. A mineral entry may be passed to patent notwithstanding the fact that the line connecting the claim with a corner of the public survey is incorrectly given in the published notice of application for patent as 822.42 feet instead of 622.42 feet, where a line connecting the claim with a corner of the official survey of another claim was correctly stated in said notice. Departmental decision of May 20, 1896, in case of Alsa R. Lode; French Lode, 22 L. D. 675.

138. Where, in the published notice of application for patent, the applicant excludes,

"without waiver of rights," the ground in conflict with another claim, he cannot thereafter embrace said conflict in his entry without giving due notice of application for said conflict in the usual manner. Departmental decision of June 18, 1896, *In re* Canuck Lode.

139. The legality of posting of notice of application for patent, upon which entry has been allowed, cannot be questioned in an action at law. Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581.

140. No application will be received or entry allowed which embraces more than one lode location. Circular, June 8, 1883. (Overruled by Good Return M. Co., 4 L. D. 221.)

141. An application for patent and entry may embrace any number of contiguous mining locations owned in common. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Good Return M. Co., 4 L. D. 221; Champion M. Co., 4 L. D. 362.

142. Where separate applications and entries are made for the several locations surveyed as one claim, the claimant may file a new application for the consolidated claim and make a new entry therefor, *nunc pro tunc*. F. A. Williams, 15 L. D. 532.

143. An entry and patent for a placer mining claim may embrace more than one hundred and sixty acres. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

144. There is no limitation as to the number of locations nor as to the area which may be embraced in a mineral entry. Com'r to J. A. Cockrum, June 8, 1893.

145. A lode claim intersected by an excluded placer must be restricted, upon entry, to that one of its non-contiguous parts on which is situated the discovery. Andromeda Lode, 13 L. D. 146; Silver Queen Lode, 16 L. D. 186.

146. If the presumed line of the lode is interrupted by a tract excluded as non-mineral, the lode claimant may not embrace the non-contiguous portion of his lode in one mineral entry. Bi-metallic M. Co., 15 L. D. 309.

147. Entry should not be allowed for a lode claim made non-contiguous by exclusion of a placer claim. Apple Blossom Placer v. Cora Lee Lode, 21 L. D. 438.

148. A mineral entry of two locations based on one discovery of mineral in a discovery shaft on the line between the two locations will be canceled. Poplar Creek Con. Qtz. Mine, 16 L. D. 1.

149. Suit may be brought to quiet title on ground of fraud after a mineral entry has been made. Lee v. Justice M. Co., 29 Pac. Rep. 1020.

150. An applicant for a placer patent who has given due notice thereof and made entry may maintain a suit to quiet title against one claiming under a conflicting lode location. Dahl v. Raunheim, 132 U. S. 260.

151. A mining location in Alabama made prior to March 3, 1883, and properly maintained, entitles the locator to make entry thereof on due compliance with law, notwithstanding the provision of the act of that date (22 Stat. 487) providing that lands in Alabama should be disposed of only as agricultural lands. Cordell Placer, 4 L. D. 476.

152. The validity of an entry depends upon facts existing when the entry was made, and not upon anything done or to be done afterward. Secretary, March 4, 1879.

153. Discovery and appropriation are recognized as the source of title to mining claims, and development by working as the condition of continued ownership, until issuance of patent therefor. (Entry of the claim and payment for the land.) Erhardt v. Boaro, 118 U. S. 527; 2 McCrary, 141; 1 Mor. Min. Rep. 452.

154. Failure to perform annual expenditure upon a claim up to date of entry will subject the claim to relocation even after application for patent and publication of notice thereof. Sweeney v. Wilson, 10 L. D. 157.

155. Where a claim has been abandoned after publication of notice of application therefor, and then relocated by a stranger, and subsequently entered by and patented to the applicant, the patentee will be declared trustee for the relocator. (Strong dissenting opinion.) South End M. Co. v. Tinney, 35 Pac. Rep. 89.

156. Before making a mineral entry the claimant must show performance of assessment work on his claim or resumption of work thereon. Circular, Dec. 14, 1885, 4 L. D. 374.

157. The failure of an applicant to perform annual labor on his claim between the dates of application for patent and of entry

will subject the claim to relocation. McNeil v. Pace, 3 L. D. 267.

158. After application for patent and publication of notice thereof, and before entry, a claim may be relocated for abandonment, and upon a showing of such abandonment and relocation the application will be canceled if no adverse claim, or suit based on an adverse claim, is pending against said application. Continental G. & S. M. Co. v. Gage, 10 L. D. 534.

159. Annual expenditure must be made on a mining claim up to the date of entry to prevent the relocation thereof for forfeiture, and the fact that large expenditures have been made will not prevent such relocation, even though the applicant *thought* he had made entry. Ferguson v. Belvoir M. & M. Co., 14 L. D. 43.

160. One desiring to apply for a mineral patent for land covered by an existing mineral application may secure its cancellation by proving abandonment of the claim applied for, at a hearing at which the applicant is a party. Moylan C. Fox, 2 L. D. 766.

161. Annual expenditures are not required upon a mining claim after the claim has been paid for and entered. Benson M. & Sm. Co. v. Alta M. & Sm. Co., 145 U. S. 428; Alta M. & Sm. Co. v. Benson M. & Sm. Co., 16 Pac. Rep. 565; Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581; Deno v. Griffin, 20 Nev. 249; 20 Pac. Rep. 308; F. P. Harrison, 2 L. D. 787; Smith v. Van Clief, 5 C. L. O. 114.

162. A corporation, applicant for mining patent, must show compliance with local requirements in the matter of filing its articles of incorporation with the proper officer; but if such evidence is on file in one entry, reference may be made thereto in subsequent entries in lieu of again furnishing the same. Alta Mill Site, 8 L. D. 195; Alta Mill Site (on review), 9 L. D. 48.

163. To be reserved from entry under the agricultural land laws and from patent issued under said laws, land must have been *known* at the time of sale (entry) to be valuable for its minerals. A discovery of its mineral character subsequent to that date cannot affect the title. Deffeback v. Hawke, 115 U. S. 392.

164. "To constitute the exemption contemplated by the pre-emption act under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. . . . A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not 'known mines,' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed." Colorado Coal & Iron Co. v. United States, 123 U. S. 307.

165. To be excepted from an agricultural entry, lands must be known, at date of entry, "to be so valuable for their minerals as to justify expenditure for their extracting." Davis' Adm'r v. Weibbold, 139 U. S. 507; S. C., 7 Mont. 107.

166. To be excepted from agricultural patent, land must have been known to be more valuable for mineral at date of agricultural entry. Development of mineral after entry is immaterial. Hunt v. Steese, 75 Cal. 620; 17 Pac. Rep. 920. (See S. C., 3 Wall. 304.) Boggs v. Merced Mining Co., 14 Cal. 279; 10 Mor. Min. Rep. 334; United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486.

167. Mineral land, to be excepted from an agricultural patent, must have been known to be such at date of agricultural claimaint's entry and payment for the land. Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348.

168. To be excepted from a final homestead entry as mineral, land must have been known, at date of such entry, to be mineral in character and more valuable therefor than for agricultural purposes. Nicholas Abercrombie, 6 L. D. 393.

169. To defeat a final homestead entry a mineral contestant must show that, at date of such entry, the land was known to be more valuable for mining than for agricultural purposes. Creswell M. Co. v. Johnson, 8 L. D. 440.

170. To be excepted from a pre-emption entry as mineral, land must be known to be such at date of the agricultural entry. A discovery of mineral after pre-emption entry of the land would not defeat the pre-emption entry. Harnish v. Wallace, 13 L. D. 108.

171. The rights of an agricultural claimant will not be affected by discovery of mineral after final agricultural entry. Arthur v. Earle, 21 L. D. 92.

172. A discovery of the mineral character of land embraced in an original homestead entry will defeat the entry. Dickinson v. Capen, 14 L. D. 426.

173. The character of land (whether mineral or non-mineral) embraced in a homestead claim may be questioned up to the date of final entry. A discovery of its mineral character between submission of defective final proof and date of final entry will defeat the homestead. Spratt v. Edwards, 15 L. D. 290.

174. The fact that land contains some gold will not except it from entry under the agricultural land laws if it is more valuable for agricultural than for mining purposes. United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486.

175. Lands in Florida claimed prior to April 1, 1890, under the homestead or pre-emption laws, and not known to be valuable for phosphate deposits at date of such claim, may be entered under such laws notwithstanding a subsequent discovery of such deposits. (Act of October 1, 1890, 26 Stat. 663.) Gary v. Todd, 18 L. D. 58.

176. An agricultural entry may embrace non-contiguous tracts where the original claim was for contiguous lands, subsequently separated by exclusion of mineral lands. McChrystal v. Eureka Town Site, 21 L. D. 478.

177. Upon a sufficient showing to the effect that a lode applied for, within a patented town site, was known to be valuable for its minerals at date of the town site entry, the Department may order an investigation with a view to the recommendation of suit to vacate the town site patent to the extent of the conflict with such lode. Thomas J. Laney, 9 L. D. 83; Plymouth Lode, 12 L. D. 513; Protector Lode, 12 L. D. 662; Pacific Slope Lode, 12 L. D. 686.

178. As known mines and valid mining claims are excepted from acquisition under the town site laws, if it is shown that a lode was known to be valuable for mineral at date of a town site entry, the Land Department will issue a patent for such lode. Com'r to Denver Office, Nov. 16, 1895, Antediluvian Lode. (Following the principle laid down in the South Star Lode, 20 L. D. 204.)

179. If a lode was known to exist at date of town site patent (entry) it is excepted from the town site patent. Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

180. A town site entry and patent are "inoperative as to all lands known at the time to be valuable for their mineral, or discovered to be such before their occupation or improvement for residence or business under the town site title." Deffeback v. Hawke, 115 U. S. 392; W. A. Simmons, 7 L. D. 283.

181. A town site entry is inoperative as against land within its limits of known mineral value. Deffeback v. Hawke, 115 U. S. 392; Pierce v. Sparks, 22 N. W. Rep. 491; Sparks v. Pierce, 115 U. S. 408.

182. A lode to be excepted from a town site patent need not have been located at date of town site entry. It is excepted if known. Richards v. Dower, 73 Cal. 477; 15 Pac. Rep. 105.

183. Where a mining claim is located upon land afterwards entered as a town site, the prior issuance of the town site patent does not affect the mining location, since the mining patent, when issued, takes effect from the date of the location of the claim by relation. Chambers v. Jones, 17 Mont. 156.

184. Land not known to be mineral at date of town site entry passes by town site patent. Tombstone Town Site Case, 15 Pac. Rep. 26,

185. Land covered by a town site patent may not be entered under the mineral land laws because discovered after the town site entry to be valuable for mineral. Thomas J. Laney, 9 L. D. 83.

186. The occupation of land for town site purposes cannot withdraw it from location and entry under the mineral land laws, if it is valuable for mineral contained. Deffeback v. Hawke, 115 U. S. 392; Sparks v. Pierce, 115 U. S. 408.

187. The occupancy of land for town site purposes is no bar to the entry of the same under the mineral land laws, if it is mineral and belongs to the United States. J. D. Rankin, 7 L. D. 411; Dotson v. Arnold, 8 L. D. 439.

188. Mere occupation of land for residence or business purposes by those who have taken no steps to acquire government title will not reserve land from mineral entry. O'Keefe v. Cannon, 52 Fed. Rep. 898.

189. Mere occupation of mineral lands for residence purposes will not except it from entry under the mineral land laws. Ferrell v. Hoge, 18 L. D. 81.

190. Occupancy of land as a mining camp, not under any law, will not reserve land from homestead entry. Raymond v. Redifer's Heirs, 21 L. D. 228.

191. A town site entry may embrace mineral land, the rights of miners being protected by section 2386, United States Revised Statutes. Rico Town Site, 1 L. D. 556.

192. A miner has no right to run a tunnel through a non-mineral portion of a town lot to work a lode that was known to exist at date of town site entry, though he may have the right to work the mine. Richards v. Dower, 73 Cal. 477; 15 Pac. Rep. 105.

193. Where land is returned as mineral in character by the United States Surveyor General, and is entered by a homestead claimant who files his non-mineral affidavit, an affidavit of a mineral claimant, alleging its mineral character, will offset the agricultural claimant's affidavit, and place the burden of proving the non-mineral character upon him. Dickinson v. Capen, 14 L. D. 426.

194. One claiming the right to enter land under the act of June 3, 1878 (20 Stat. 89) [Timber and Stone Act], has the burden of proving the land to be properly subject to entry under said act. Smith v. Buckley, 15 L. D. 321.

195. Where a mineral entry has been allowed upon a satisfactory showing of the mineral character of the land, a hearing will not be ordered on the protest of an agricultural claimant unless it be alleged that the land was agricultural in character at date of filing of mineral application for patent. Houghton v. McDermott, 15 L. D. 509.

196. Preference right of entry will be accorded an agricultural contestant who secures the cancellation of a mineral entry because of the non-mineral character of the land. Dornen v. Vaughn, 16 L. D. 8.

197. The entry of a lode claim, conflicting with a patented placer, may be suspended to allow the lode claimant opportunity to show at a hearing that the lode was known at date of placer application, with a view to the recommendation of suit to vacate patent for the placer claim. Rebel Lode, 12 L. D. 683. (Modified in South Star Lode, 20 L. D. 204.)

198. A lode to be excepted from a placer entry must have been known at date of the application for placer patent. War Dance Lode v. Church Placer, 1 L. D. 549.

199. A hearing to determine the mineral or non-mineral character of land should not be ordered in the absence of an application to enter it. Central Pacific R. R. Co., 9 L. D. 613.

200. An employee of the Surveyor General's office may not make entry of public land. Herbert McMicken, 10 L. D. 97.

201. A United States Deputy Mineral Surveyor may make a mineral entry of land within the district for which he is appointed, but in such case he should not act in an official capacity, but simply as a claimant. Denison & Willits, 11 C. L. O. 261; Lock Lode, 6 L. D. 105.

202. A Deputy United States Surveyor, under contract to survey public land for the government, is prohibited by section 452, United States Revised Statutes, from making an entry of public land. Muller v. Coleman, 18 L. D. 394.

203. An entry of public lands may not be made in the interest of the local land officers. Departmental decision of June 23, 1879.

204. A special agent of the land office may not make an entry of public lands. (Sec. 452, U. S. Rev. Stat.) Walker v. Prosser, 18 L. D. 425.

205. An entry of public lands by an alien who has not declared his intention to become a citizen is not void but voidable. Ole O. Krogstad, 4 L. D. 564; Jacob H. Edens, 7 L. D. 229; Paul O. Brewster, 7 L. D. 471; Leary v. Manuel, 12 L. D. 345.

206. A mineral entry made by an alien is voidable but not void, and while of record segregates the land. Leary v. Manuel, 12 L. D. 345.

207. A mineral entry made by a citizen as trustee for an alien corporation will be canceled. Capricorn Placer, 10 L. D. 641.

208. A mineral entry made by a citizen for the benefit of an alien corporation is illegal and will be canceled. Hook v. Latham, 11 L. D. 425.

209. An alien, though he may not locate or enter public lands, may, until office found, hold a mining claim under possessory title as grantee of a qualified locator. Ferguson v. Neville, 61 Cal. 356.

210. After entry the Land Department does not inquire about sales of the land entered, and in this case patent is ordered issued in the name of the dead applicant. F. P. Harrison, 2 L. D. 767.

211. Where the possessory title to a mining claim becomes vested (either by location or transfer) in one who dies before applying for a patent, if application and entry are made by the heirs, devisees, executor or administrator, patent will be issued in the name of the decedent, the Land Department refusing to pass upon the title of those claiming under the decedent. Com'r to Helena Office, March 25, 1896, *In re* Broadwater Placer.

212. The heirs of a decedent who make entry must show citizenship. Gulch & Lake View Lodes, Com'r to Durango Office, Feb. 14, 1896.

213. An entry of public lands, though voidable, is nevertheless a segregation of the land covered thereby. Graham v. Hastings, etc. Ry. Co., 1 L. D. 380; F. P. Harrison, 2 L. D. 767; St. Paul, etc. R. R. Co. v. Forseth, 3 L. D. 446; St. Paul, etc. R. R. Co. v. Leech, 3 L. D. 506; Hallants v. Sullivan, 5 L. D. 115; Leary v. Manuel, 12 L. D. 345.

214. A party who is not an applicant for patent under section 2325, United States Revised Statutes, or the assignee of such applicant, is not entitled to make entry under said section, and in no case will the name of such party be inserted in the certificate of entry. This regulation has no reference to proceedings under section 2326, United States Revised Statutes. Circular, June 8, 1883, 2 L. D. 725; Montana Co., 6 L. D. 261; Com'r to Durango Office, Dec. 8, 1891, *In re* Honey Comb Lode.

215. Where a locator of a mining claim conveys the same, with an agreement that he shall secure patent therefor in his own name, he may be allowed to make application and entry for the claim, notwithstanding his lack of title. A. P. Smith, 3 L. D. 340.

216. An entry may be passed to patent which was made by one claiming under a deed which was in fact a mortgage, where perfect legal title has since become vested in the entryman. White Extension West Lode, 22 L. D. 677.

217. An entry of a lode and mill site, not owned in common, may be referred to the Board of Equitable Adjudication. Com'r to Secretary, Nov. 23, 1893, *In re* Southern Pride Lode and Mill Site.

218. Where a claim is sold on execution after application for patent has been made therefor and notice given thereof, the vendee merely takes a right to make entry of the claim if he chooses so to do, and if he allows the applicant to make entry of the claim he has no legal remedy against the entryman, who, by entry, acquired a new and further title, which had not been sold to the judgment vendee. Hamilton v. Southern Nevada M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314.

219. A deed of mineral entries Nos. 1 and 2, lots 3 and 4, patented as the A. and B. claims, may, if such appears to have been the intent of the parties, be held to convey all of grantor's title to the A. and B. claims, even though the patent covered only parts thereof. Crescent M. Co. v. Wasatch M. Co., 19 Pac. Rep. 198; Jackson v. Dines, 13 Colo. 90; 21 Pac. Rep. 918.

220. A protestant against a mineral entry, who failed to file an adverse claim and who does not allege non-compliance with the law on the part of the entryman, is not entitled to appeal from the decision of the General Land Office dismissing his protest. Cedar Hill M. Co. v. Jacob Little Con. M. Co., 1 L. D. 628.

221. No part of a mineral entry can stand if based upon a false survey and publication. Gustavus Hagland, 1 L. D. 593.

222. Land to be subject to entry under the placer law must be shown to be placer mining land as a present fact. Searle Placer, 11 L. D. 441.

223. Land to be enterable under the mineral land law must be shown to contain mineral in such quantities as will render profitable the working of the claim. It must, under the placer law, contain a valuable deposit. Royal K. Placer, 13 L. D. 86.

224. The entry as a placer claim of land known to be valuable only for lodes contained is illegal, and will be canceled. Grosfield v. Nigger Hill Cons. M. Co., 14 L. D. 685.

225. Entry of a conflict embraced in a prior entry is irregular, but may stand on

cancellation of the prior entry. Moss Rose Lode, 11 L. D. 120.

226. Entry should not be allowed when it is shown that the lode is not embraced within claimed ground, as the right to surface ground depends on possession of a lode therein. Branagan v. Dulaney, 2 L. D. 744.

227. Relinquishment of a part of a claim embraced in a mineral entry must be accompanied by an abstract of title showing title at date of relinquishment to be in the one executing it. Ground Hog Lode, 20 L. D. 211; Com'r to Pueblo Office, Sept. 30, 1895, *In re* Lookout and other Lodes.

228. The application for patent for a mining claim and the exclusion from the entry thereof of a part of the claim renders the excluded portion vacant public land, viz., such exclusion operates, *pro tanto*, as an abandonment. Adams Lode, 16 L. D. 233.

229. Exclusion from entry and patent of a mining claim, of conflict with another claim, does not preclude the patentee from holding the excluded ground under his possessory title and raises no presumption against such title. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

230. A mineral applicant for patent may exclude from his entry conflicts with other claims without waiving any rights thereto. Aspen Cons. M. Co., 22 L. D. 8.

231. An applicant for a mineral patent may make entry of his claim exclusive of land covered by an adverse claim and take patent for the land not in conflict, without waiving his possessory right to the excluded portion. Black Queen Lode v. Excelsior No. 1 Lode, 22 L. D. 343.

232. Relinquishments by claimants of small isolated tracts for the sole purpose of enabling other claims otherwise invalid to be made is wrong, and will not be encouraged. If no adverse claim shall have been filed, or, if filed, judgment is rendered in defendant's favor, he will be assumed to own the whole tract applied for, and final papers will be issued accordingly. Late Acquisition Cons. M. Co., 18 C. L. O. 208.

233. Where a mineral entry of a placer claim taken by legal subdivisions has been canceled as to that portion of the claim on which the discovery and improvements are situate, no further time will be allowed within which to make a discovery on every twenty-acre tract remaining, or to make an expenditure of $500 thereon, as the location of the claim without such discovery was invalid. Departmental decision of May 20, 1896, *In re* Eliza Sweeney.

234. Where the discovery and improvements are excluded from the entry of a mining claim, the entry will be canceled unless it is shown that mineral has been discovered and the requisite expenditure made upon claimed ground. A reconveyance by another lode claimant of the patented excluded ground will not be accepted, in such a case, as reinvesting title to the same in the government for the purpose of patenting it with the claim last entered. Winter Lode, 22 L. D. 362.

235. Patent will not issue for a lode mining claim where the land on which are situate the discovery and improvements is excluded from the entry, unless a discovery and the required expenditure are shown to have been made on entered ground. Antediluvian Lode and Mill Site, 8 L. D. 602; Thomas J. Laney, 9 L. D. 83; Edward W. Williams, 20 L. D. 458.

236. To be enterable under the first clause of section 2337, United States Revised Statutes, a mill site must be: (1) non-mineral; (2) non-contiguous to the lode, and (3) used or occupied by the owner of the lode for mining or milling purposes. Gold Springs & Denver City Mill Site, 13 L. D. 175.

237. The use, in the mine, of timber growing upon land is not such a use of the land as will warrant entry thereof as a mill site appurtenant to the mine under the first clause of section 2337, United States Revised Statutes. Two Sisters Lode and Mill Site, 7 L. D. 557.

238. The fact that land has upon it "a dam on Middle Percha creek with a cribbing on each side to keep embankment in place; a water box with screen; a pipe line extended thence to smelter reservoir," etc., will not entitle the claimant to enter the same as a mill site, the use of water taken from the land not being a use of the land. Iron King Mine and Mill Site, 9 L. D., 201.

239. The mere use of water from springs on the land in connection with the working of a lode claim is not such a use and occupancy of the land as will render it subject to entry as a mill site. Charles Lennig, 5 L. D. 190; Cyprus Mill Site, 6 L. D. 706.

240. The use of land as a site for pumping works for supplying water to a mining claim

is such a use as will allow entry of the land as an adjunct to a lode claim under the first clause of section 2337, United States Revised Statutes. Sierra Grande M. Co. v. Crawford, 11 L. D. 338.

241. An entry of a mill site as appurtenant to a lode claim will be canceled on its being shown that the mill site is not so used, but is entered for the benefit of another to be used for other than mining purposes. Syndicate Mill Site, 11 L. D. 561.

242. The erection and use on a mill site of dwelling-houses for the use of miners working on the lode claim applied for in connection therewith is such a use and occupancy as will justify entry of the land under the first clause of section 2337, United States Revised Statutes. Satisfaction Extension Mill Site, 14 L. D. 173.

243. A tract on which are situate a house used as an office, and residence of the superintendent of the mine, a stable, a railroad sidetrack, and a store-house, all used in connection with a patented lode claim, is so used and occupied as to be enterable as a mill site under the first clause of section 2337, United States Revised Statutes. Eclipse Mill Site, 23 L. D. 496.

244. A tract of land claimed and used for mining and milling purposes in connection with a patented lode claim may be entered under the first clause of section 2337, United States Revised Statutes, viz., the mill site need not be applied for and entered with the lode claim. Eclipse Mill Site, 23 L. D. 496; Departmental decision of May 23, 1896, *In re* Idaho Mill Site.

245. The right to make entry of a mill site under the second clause of section 2337, United States Revised Statutes, depends upon the existence thereon of a quartz mill or reduction works. Charles Lennig, 5 L. D. 190; Cyprus Mill Site, 6 L. D. 706; Two Sisters Lode and Mill Site, 7 L. D. 557; Le Neve Mill Site, 9 L. D. 460; Hecla Cons. M. Co., 12 L. D. 75.

246. The fact that land is covered by a water right, held under local laws, will not bar entry thereof as a mill site. Charles Lennig, 5 L. D. 190.

247. A mill site is a mining claim or possession under section 2392, United States Revised Statutes, and is excepted from a town site patent if located prior to town site entry. Hartman v. Smith, 7 Mont. 19; 14 Pac. Rep. 648.

248. Stone valuable only for building purposes is not subject to entry under the provisions of Chapter 6, Title XXXII, United States Revised Statutes (but see act Aug. 4, 1892, 27 Stat. 348). Conlin v. Kelly, 12 L. D. 1.

249. A mineral entry of land principally valuable for ordinary building stone, allowed under the then existing practice (prior to Departmental decision, *In re* Conlin v. Kelly, 12 L. D. 1), excepts the lands so entered from the operation of a subsequent grant to a State for school purposes and may be passed to patent. Paris Gibson, 21 L. D. 327.

250. The act of August 4, 1892 (27 Stat. 348), authorizes a placer entry of land chiefly valuable for building stone. Minnekahta Stone Mine, 15 L. D. 256.

251. Where a mineral entry has been allowed after due notice of application for patent, a protestant who admits the sufficiency of such notice appears solely as *amicus curiæ*, without right of appeal from a decision of the General Land Office dismissing his protest. Bright v. Elkhorn M. Co., 8 L. D. 122.

252. A protestant appearing merely as *amicus curiæ* has no right of appeal; but where a protestant appears after entry and an investigation is ordered, at which he undertakes to sustain the allegations made in the protest, and where, if the entry should be canceled, he would have an equal right with other parties to enter the land, he should be granted the full rights of a party litigant. Martin v. Granite Mtn. M. Co., 15 C. L. O. 50.

253. A certificate of purchase of mineral land at the local land office, if no adverse claim is filed, and the entry is not disaffirmed by the Land Department, passes the right of the government, and as against any other party is equivalent to a patent. The land thereby ceases to be the subject of sale by the government, which thereafter holds the legal title in trust for the holder of the certificate. Deffeback v. Hawke, 115 U. S. 392.

254. The Land Department has authority to order a hearing to determine whether there has been due compliance with the mining law, though the charge is not made until after entry. An original locator will not be heard to question the validity of a relocation in a proceeding instituted to determine whether said locator had complied with the

law in the matter of the annual statutory expenditure. Sweeney v. Wilson, 10 L. D. 157.

255. Where a special agent reports non-compliance with the mining law in the matter of expenditures, notice should be given the mining claimants that a hearing will be had, and the special agent should be directed to produce witnesses to sustain his report. Franklin L. Bush, 11 C. L. O. 34.

256. Instead of canceling a mineral entry for insufficient proof the claimant should be allowed opportunity to submit supplementary proof. William G. Pell, 4 L. D. 160.

257. The invalidity of an entry as to one tract is of no effect on the entry as to the remainder of the land entered. Cornelius v. Kessel, 128 U. S. 456.

258. Where the entry was allowed on insufficient evidence as to the character of the land and the requisite expenditure thereon, supplementary proof may be submitted in the absence of protest or adverse claim. James D. Rankin, 7 L. D. 411.

259. After making a mineral entry, the legal presumption is in favor of all requisite proceedings antecedent thereto. Louisville Lode, 1 L. D. 548.

260. The burden of proof is upon one attacking the validity of a regularly allowed mineral entry. Tangerman v. Aurora Hill M. Co., 9 L. D. 538.

261. The allowance of a mineral entry on land returned by the Surveyor General as agricultural overcomes the presumption raised by such return, and the burden of proof is thereafter upon one alleging the non-mineral character of the land. Walton v. Batten, 14 L. D. 54.

262. The allowance of mineral entry is an adjudication of the mineral character of the land entered, and the burden of proof is thereafter upon one who alleges its non-mineral character. Johns v. Marsh, 15 L. D. 196.

263. Where a mineral entry has been allowed on satisfactory evidence of compliance with the law, the burden is upon a contestant to show non-compliance. Hargrove v. Robertson, 15 L. D. 499.

264. The discovery and location of a claim in pursuance of the law is equivalent to a contract of sale and purchase, where the purchaser is let into possession and becomes entitled to a deed upon payment of purchase-money, and making of a certain expenditure. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

265. The fact that a location of a mining claim may have been defective, in that it was not made in accordance with the mining district rules as to width of the claim and the record of location notice, is rendered immaterial by the repeal and annulment of such rules prior to allowance of mineral entry. Walter C. Childs, 10 L. D. 173.

266. Railroad companies claiming under grants of non-mineral lands are not entitled to be notified of the allowance or approval of mineral entries within the limits of the grant prior to selection of the land by the companies. Northern Pacific R. R. Co., 13 L. D. 691.

267. An entry may not embrace ground not covered by the application for patent and not described in the notices published and posted. But if the entry does embrace such ground, the claimant may be allowed to publish and post notice of application therefor, with the same rights to adverse claimants as under ordinary notice. Com'r to Del Norte Office, March 30, 1878, *In re* Green Bay Lode.

PATENT.

I. THE STATUTE.
II. DECISIONS.
1. *Adverse.*
2. *Agricultural.*
3. *Alien.*
4. *Assignee.*
5. *Description.*
6. *Dip — Apex.*
7. *Discovery.*
8. *Easement.*
9. *Effect — Presumption attending.*
10. *Exclusions.*
11. *Grant.*
12. *How attacked.*
13. *Land Department.*
14. *Lode — Placer.*
15. *Mill Site.*
16. *Record.*
17. *Relation.*
18. *Statute of Limitations.*
19. *Town Site.*
20. *Trust.*
21. *Vacation.*
22. *General.*

I. The Statute.

(See sec. 2325, U. S. Rev. Stat., p. 137.)

An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * * *

No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States. * * * *

Approved August 30, 1890. (26 Stat. 371.)

The above restriction as to entry of more than three hundred and twenty acres does not apply to mineral land entries. Sec. 17, Act approved March 3, 1891. (26 Stat. 1095.)

II. Decisions.

1. *Adverse.*

(See Adverse, p. 284.)

1. On an adverse suit the right of each party to enter the land should be decided. Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419.

2. An adverse suit is to determine who is entitled to a patent to the disputed ground. Jackson v. Roby, 109 U. S. 440; Wolverton v. Nichols, 119 U. S. 485. (See 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309.) Waterloo M. Co. v. Doe, 56 Fed. Rep. 685; Le Doon v. Tesh, 68 Cal. 43; 8 Pac. Rep. 621; McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329; Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304. (Second trial, 17 Colo. 243; 29 Pac. Rep. 173.) Manning v. Strehlow, 11 Colo. 451; 18 Pac. Rep. 625; Thomas v. Chisholm, 13 Colo. 105; 21 Pac. Rep. 1019; Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324; Burke v. McDonald, 2 Idaho, 310; 13 Pac. Rep. 351.

3. The object and purpose of an action under section 2326, United States Revised Statutes, is not only to settle the controversy as between the claimants, but for the information of the officers of the Land Department; and to recover, either party must show *by proof* the right to a patent. An admission of material facts by the opposing party will not avail, but the facts must be *found*. Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324.

4. In an adverse suit each party must prove his right to a patent by a compliance with the statutes, State and Federal, and miners' rules and regulations in force relative to location, in order to recover a judgment for the ground in controversy. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304. (Second trial, 17 Colo. 243; 29 Pac. Rep. 173.)

5. Neither party to an adverse suit is entitled to judgment unless he shows himself to be entitled to a patent by virtue of a compliance with the mining laws. If neither party establishes such a right, the jury must so find, and proceedings in the land office will be stayed. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

6. The successful party to an adverse suit is entitled to a patent, the object of the suit being the information of the Land Department. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

7. The fact of an adverse claimant obtaining judgment in court in his favor does not necessarily entitle him to a patent. Antelope Lode, 2 C. L. O. 2.

8. On adverse suit the court has to determine only the right of possession, not the right of either party to a patent. Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

9. The patentee of a mining claim is not obliged to file an adverse claim against a second application for a conflicting claim. Mantle v. Noyes, 5 Mont. 274; 5 Pac. Rep. 856; 15 Mor. Min. Rep. 611. See S. C., 127 U. S. 348.

10. When application for patent is made for a lode claim embraced within a patented town site, the town site claimants should protect any rights they may have by filing an adverse claim and securing a judicial determination thereof. If they fail so to do the United States will not bring suit to vacate

the lode patent. Smoke House Lode, Butte City, 4 L. D. 555.

11. A conflicting survey already patented cannot, as an adverse claim, delay an application for a patent. Equator M. & Sm. Co., 2 C. L. O. 114.

12. A co-owner need not protect his rights by adverse, if application for patent is made in their own names by the other co-owners; but if patent issues to them they will be declared constructive trustees for the owner whose name is omitted from the application. Brundy v. Mayfield, 15 Mont. 201; 38 Pac. Rep. 1067; Turner v. Sawyer, 150 U. S. 578. *Contra*, Grampian Lode, 1 L. D. 544; Monitor Lode, 18 L. D. 358.

13. Dower interest in a mining location must be protected by an adverse claim under section 2326, United States Revised Statutes, as the possessory title which is subject to dower merges in the absolute fee simple title on issuance of patent. Black v. Elkhorn M. Co., 49 Fed. Rep. 549.

14. While a suit brought under the provisions of section 2326, United States Revised Statutes, is pending undetermined in court, it is not for the Land Department to decide whether or not suit has been prosecuted with reasonable diligence, and a patent issued by the Department during the pendency of such a suit involving the land, is issued without authority of law, is void, and may be attacked collaterally in a court of law. Richmond M. Co. v. Rose, 114 U. S. 576.

15. A patent issued for a mining claim during the pendency of suit properly brought on an adverse claim is void. Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; 114 U. S. 576.

16. An adverse claim must be settled or waived before a patent can issue. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

17. The allowance of mineral entry during the pendency of an adverse suit has no effect on the patent issued after the termination of the adverse suit in favor of the applicant. Deno v. Griffin, 20 Nev. 249; 20 Pac. Rep. 808.

18. "If no adverse claim is filed during the required period of publication, it is assumed that the applicant is entitled to patent, and no agreement of parties can control this statutory provision. If either party claims a nonfulfillment of such agreement by the other, the remedy must be found in the courts, and not before your office or this Department." Gustavus Hagland, 1 L. D. 591; Independence Lode, 9 L. D. 571.

19. A. and B. claim the same vein under conflicting locations. A verbal agreement is made that A. should obtain patent and convey a one-half interest to B., expenses to be borne equally. On suit to compel specific performance, it was held that the agreement was within the Statute of Frauds; that relinquishing a disputed possession and simply refraining from filing an adverse claim did not constitute a part performance, such as would take the agreement out of the statute, and that even a part payment of expenses of securing patent could not avail plaintiff, for the reason that there was no such mutuality of obligation in the agreement as would have enabled the defendant to compel such payment had plaintiff seen fit to refuse it. Ducie v. Ford, 8 Mont. 233; S. C., 138 U. S. 587.

20. A patent may issue for a mining claim, where a waiver of adverse claim is filed in the land office, without requiring evidence of the disposition of the suit instituted on the adverse claim. St. Lawrence M. Co. v. Albion Cons. M. Co., 4 L. D. 117.

21. Where an adverse claim is filed against an application for patent, the applicant may (1) suspend proceedings before the Land Department and litigate with the adverse claimant, (2) relinquish the ground in conflict from his application (litigating therefor) and take patent for the remainder of his claim, or (3) dismiss his application for patent in its entirety and continue to claim under possessory title. Branagan v. Dulaney, 2 L. D. 744.

22. An applicant for patent may abandon the part adversely claimed, and after survey receive a patent for the part not in controversy. Fairmount G. & S. M. Co., 1 C. L. O. 82.

23. An abandonment of surface ground in conflict does not terminate the contest initiated by an adverse claimant, but the judgment of the court must be had upon all questions before patent can issue. Ayers v. Daly, 3 C. L. O. 196.

24. Issuance of patent for a mining claim during pendency of adverse suit is no ground for dismissal of the suit. Frien v. Oggshaw, 3 Wyo. 59.

25. An adverse claimant, whose adverse suit has been dismissed, cannot complain of

the fact that entry was made and patent issued during the pendency of such suit, and the validity of the patent is not affected by such irregularity. Deno v. Griffin, 20 Nev. 249; 20 Pac. Rep. 308.

26. In case of failure to adverse, only crossveins and those uniting on the dip with the one patented are excepted from the patent. Lee v. Stahl, 13 Colo. 174; 22 Pac. Rep. 436. (Affirming 9 Colo. 208; 11 Pac. Rep. 77.)

27. A judgment rendered on an adverse suit, awarding the surface of the ground involved to a placer claimant and lodes therein contained to lode claimants, is without authority of law, and will not be followed by the Land Department, which will not issue a patent for a placer claim containing known lodes belonging to one other than the placer claimant. Apple Blossom Placer v. Cora Lee Lode, 14 L. D. 641.

28. All adverse claims are barred by the issuance of patent. Raunhein v. Dahl, 6 Mont. 167; 9 Pac. Rep. 892; S. C., 133 U. S. 260; Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

29. A successful adverse claimant should have a plat and field-notes constructed by the United States Surveyor General from the copy of the judgment roll, showing the ground awarded him. He must file said plat and field-notes, together with the Surveyor General's certificate of $500 expenditure and certified copy of the judgment roll, in the local land office, and may thereupon make payment for the land. Albert F. Harsh, 2 L. D. 706.

2. *Agricultural.*

(See AGRICULTURAL CLAIM, p. 376.)

30. To be reserved from entry under the agricultural land laws, and from patent issued under said laws, land must have been *known* at the time of sale (entry) to be valuable for its minerals. A discovery of its mineral character subsequent to that date cannot affect the title. Deffeback v. Hawke, 115 U. S. 392.

31. To be excepted from an agricultural patent, land must have been known to be more valuable for mineral than for agricultural purposes at date of agricultural entry. Development after entry is immaterial. Hunt v. Steese, 75 Cal. 620; 17 Pac. Rep. 920; Boggs v. Merced M. Co., 14 Cal. 380; 10 Mor. Min. Rep. 334; United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486.

32. The discovery that land is valuable for coal, after a final homestead entry, will not reserve it from patenting under the homestead entry. Nicholas Abercrombie, 6 L. D. 393.

33. Mineral land to be excepted from an agricultural patent must have been known to be such at date of the agricultural claimant's entry and payment for the land. Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 848.

34. A patent to a tract of land under the pre-emption or homestead laws does not give title to known mines. Hugh B. Newell, 3 C. L. O. 50; Bellows v. Champion Mine, 4 C. L. O. 17; George M. Hurlbut, 5 C. L. O. 5.

35. An agricultural entry of mineral lands gives no right to a patent. Scogin v. Culver, 7 C. L. O. 23.

36. An agricultural patent is void as against pre-existing valid mining claims. Gold Hill Qtz. M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 685.

37. The rightful owners will be allowed to secure patent for their mine, notwithstanding the patenting of a Porterfield warrant covering the land. A. V. Weise, 2 C. L. O. 130.

38. Where a patent issued on an agricultural claim, and thereafter patent inadvertently issued for a mining claim in conflict therewith, and it is shown that said mining claim was located prior to the agricultural entry, parties claiming under said patents will be left to their remedies in court. Com'r to Salt Lake City Office, Feb. 26, 1896, Bently v. Gibbons.

3. *Alien.*

(See CITIZENSHIP, p. 48.)

39. The title of a claimant of the public mineral lands as locator of a mining claim may not be questioned on the ground of alienage by any one excepting the United States, or in proceedings to obtain United States patent (on adverse suit). Billings v. Aspen M. & Sm. Co., 10 U. S. App. 1, 322; 51 Fed. Rep. 338; Wood v. Aspen M. & Sm. Co., 36 Fed. Rep. 25.

40. Aliens cannot hold a mining claim prior to the issuance of patent therefor. Beckner v. Coates, 3 C. L. O. 18.

41. An alien cannot locate, possess, purchase or acquire title by patent to mineral land. Tibbitts v. Ah Tong, 4 Mont. 536.

42. A mining claim sold to an alien cannot be patented while such owner is an alien. William S. Wood, 3 C. L. O. 69.

43. Locators and intermediate owners, other than applicants, will not be presumed aliens in the absence of allegations or objection prior to issuance of patent. Wandering Boy Lode, 2 C. L. O. 2.

44. A foreign corporation, assignee of a patentee, has the same rights before the Land Department as the patentee. William W. Ramage, 2 C. L. O. 115.

4. *Assignee.*

45. "Until patent has issued, the Department has full and complete jurisdiction over all entries not confirmed by the statute, and persons who purchase on the faith of the receiver's receipt do so at their own risk and take the land subject to all the infirmities of title, so far as the government is concerned." Louise M. Co., 22 L. D. 662.

46. The grantee of an entryman before issuance of patent takes no better title than his grantor, and cannot pose before the Land Department as an innocent purchaser. R. M. Chrisinger, 4 L. D. 347.

47. A purchaser of land after entry, but before issuance of patent, is simply the assignee of an equitable interest, and as such takes with notice of all defects in title. Murphy v. Sanford, 11 L. D. 123; William E. McIntyre, 6 L. D. 503; C. A. Kibling, 7 L. D. 327; George Hague, 18 L. D. 388; United States v. Miller, 14 L. D. 617.

48. The transferee of a coal entryman, prior to the issuance of patent, takes no greater right than his grantor had, *i. e.*, an equitable title, and the entry is subject to cancellation by the Land Department, just as though no transfer had been made. Scott v. Sheldon, 15 L. D. 588.

49. When, between the dates of making entry and issuance of patent, the entryman sells the claim, the grantee holds under the patent, which relates back to date of entry. Brown v. Warren, 16 Nev. 229.

5. *Description.*

50. The limits of a patented mining claim may be identified by location monuments when the description of the claim in the patent by courses and distances is found to be incorrect. In identifying property by a patent, monuments will control courses and distances in case of discrepancy. A patent is not void if the claim patented may be identified by monuments therein referred to, even if the course and length of the lines of survey of the claim are erroneous. Cullacott v. Cash G. & S. M. Co., 8 Colo. 179; 6 Pac. Rep. 211; 15 Mor. Min. Rep. 392.

51. A patent is not conclusive as to the correct boundaries and *locus* of the claim, but may be shown to be erroneous in the matter of description. Bell v. Skillicorn, 28 Pac. Rep. 768.

6. *Dip — Apex.*

(See SURFACE GROUND, p. 61.)

52. In the absence of a showing to the contrary, it is presumed that a patentee of a claim has the right to any lode inside of his surface lines. Iron Silver M. Co. v. Campbell, 17 Colo. 267; 29 Pac. Rep. 513.

53. A patentee has a *prima facie* right to all minerals inside the lines of his claim, and the burden is on one following a lode on its dip into the claim to show that he has a valid location on the apex of the lode. Duggan v. Davey, 26 N. W. Rep. 887.

54. A patentee has a *prima facie* right to all mineral within the surface lines of his claim, and the burden of proof is on one who claims the right to take the same as part of a lode dipping under said claim, to show title to the same. Bell v. Skillicorn, 28 Pac. Rep. 768.

55. Under section 2322, United States Revised Statutes, the locator of a mining claim on the apex of a lode may follow the lode on its dip, even though it dips into a claim held under a senior patent. Colorado Central Cons. M. Co. v. Turck, 4 U. S. App. 290; 50 Fed. Rep. 888; 12 U. S. App. 85.

56. A lode patent is subject to the rights of others to follow their lodes on the dip under the patented claim. Cheesman v. Hart, 42 Fed. Rep. 98.

57. A locator on the dip has no right as against a locator on the apex, the date of respective patents being immaterial. Colorado Central Cons. M. Co. v. Turck, 4 U. S. App. 290; 50 Fed. Rep. 888; 12 U. S. App. 85.

58. Though a United States patent grants the right to follow on its dip the patented lode, such right may be restricted, as between parties, by a contract made before patent. Richmond M. Co. v. Eureka M. Co., 103 U. S. 839; 9 Mor. Min. Rep. 634. (Former trials S. C., 8 Mor. Min. Rep. 144; 9 Mor. Min. Rep. 578.)

7. *Discovery.*

(See DISCOVERY, p. 40.)

59. The discovery and location of a claim in pursuance of the law is equivalent to a contract of sale and purchase where the purchaser is let into possession and becomes entitled to a deed upon payment of purchase-money and making of a certain expenditure. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

60. Discovery and appropriation are recognized as the sources of title to mining claims, and development by working as the condition of continued ownership, until issuance of patent therefor (entry of the claim and payment for the land). Erhardt v. Boaro, 113 U. S. 527; 4 Mor. Min. Rep. 432.

61. A patent will not issue for a lode claim the discovery of which is excluded from the entry. Edward W. Williams, 20 L. D. 458.

62. A location of a lode claim must be based on a discovery of a vein or lode on vacant public land. If the discoverer whose sole discovery is upon a conflicting claim allows such conflicting claim to be patented inclusive of his discovery, he loses all right under his location, and his claim becomes open to exploration and location by others. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

63. The patenting of the discovery shaft of a first locator to a subsequent locator of a conflicting claim leaves the first claim subject to relocation. Miller v. Girard, 33 Pac. Rep. 69.

64. Where the original discovery shaft of a mining location is included within a subsequent location as patented, on the failure of the first locator to commence adverse proceedings within the time required, or to set up a new discovery stake at a new discovery shaft on unappropriated ground, he loses all rights under the prior location, not only as against the patentee but also as against subsequent locators. Girard v. Carson, 44 Pac. Rep. 508 (Colo.).

65. The decision of the Department, *In re* Juniata Lode, 13 L. D. 715 (wherein the Department consented to accept a reconveyance of a part of a patented placer claim covered by a lode location, for the purpose of issuing patent for the lode claim without suit to vacate the placer patent), is not applicable where it is desired to allow a lode patentee to reconvey a tract for the purpose of giving an unpatented lode claim its discovery. Winter Lode, 22 L. D. 362.

66. Patent cannot be issued based upon a discovery made after application therefor. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

67. When the complaint in an action to annul a patent alleged in substance that no discovery had been made, and the evidence is conflicting, proof that the claim was considered valuable for mining purposes was held sufficient, and the patentees were not obliged to show that there was a reasonable probability of the claim becoming a source of profit to constitute a mine within the meaning of the statute. United States v. King, 9 Mont. 75.

68. Before land may be patented under the mineral land laws, "there must be a discovery of the mineral, and a sufficient exploration of the ground to show this fact beyond question." United States v. Iron Silver M. Co., 128 U. S. 673. (Affirming S. C., 24 Fed. Rep. 568.)

69. In ejectment for a mining claim, where it appears that the discovery shafts of both parties are identical, evidence that the discoveries were made on lands patented prior to the dates of discovery of either party should be admitted, and if the fact is found, neither party can recover. Moyle v. Bullene, 44 Pac. Rep. 69 (Colo.).

8. *Easement.*

70. The fact that a mining claim is subject to an easement in the shape of a right of a railroad company to lay tracks and place necessary station buildings on the same will not prevent the issuance of patent. Eugene McCarthy, 14 L. D. 105.

71. A patentee of mining land, over which an adjoining owner had for several years, by local custom and from necessity, maintained

a ditch to carry detritus from a hydraulic mine to a river, took subject to the easement. (Sec. 2339.) Jacob v. Day, 44 Pac. Rep. 243 (Cal.).

9. *Effect — Presumption Attending.*

72. Land patents, in actions at law, are conclusive "of all matters of fact necessary to their issue, where the Department had jurisdiction to act upon such matters and to determine them; but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale, or other disposition, or they had been reserved from sale, the Department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void, no matter with what seeming regularity the forms of law have been observed." Davis' Adm'r v. Weibbold, 139 U. S. 507. See 7 Mont. 107.

73. The issuance of patent evidences discovery, proper location, marking, posting of notice, recording thereof, requisite expenditure, notice of application, and that all other steps to acquire patent, required by law, were regularly taken. Last Chance M. Co. v. Tyler M. Co., 15 U. S. App. 456.

74. No one in a court of law can go behind a patent and call in question the validity of the proceedings upon which it is founded. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

75. A mining patent proves that the land is mineral; that the location was valid; that $500 had been expended for development; and that all other things necessary were done. Beard v. Federy, 3 Wall. 492; Stark v. Starr, 6 Wall. 418; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Eureka Cons. M. Co. v. Richmond M. Co. (Eureka case), 4 Sawy. 302; 9 Mor. Min. Rep. 578; Moore v. Wilkinson, 13 Cal. 478; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

76. After issuance of patent to a mining claim, the sufficiency of the location notice cannot be questioned. Chambers v. Jones, 17 Mont. 156. (Citing and quoting approvingly, Talbott v. King, 6 Mont. 131.)

77. "The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof." United States v. Iron Silver M. Co., 128 U. S. 673. (Affirming S. C., 24 Fed. Rep. 568.)

78. When a patent issues under a law which provides for the disposal of land as agricultural, and there is no reservation in the law, except a general one of mineral, and none in the patent, the patent is a conclusive adjudication by the government that the land is agricultural, and a court may not thereafter collaterally reopen the question as to the character of the land. Gale v. Best, 78 Cal. 235.

79. A patentee cannot be required to explain every step toward the acquisition thereof, nor to prove the performance of all required acts leading thereto. United States v. Marshall M. Co., 129 U. S. 579.

80. The issuance of a mineral patent "is *prima facie* evidence that a discovery of mineral was made; that the land was properly located as mineral land; that the application for patent, the notices given by the defendants (applicants) and all other steps required by the law had been regularly taken." N. P. R. R. Co. v. Cannon, 7 U. S. App. 507.

81. A patent is proof of compliance by the patentee or his grantors with all the requirements of law. Last Chance M. Co. v. Tyler M. Co., 9 U. S. App. 613; 61 Fed. Rep. 557.

82. A patent evidences a grant, and the presumption is that all acts have been performed and all facts have been shown which are prerequisites to its issuance. Green v. Barker, 66 N. W. Rep. 1032.

83. A patent issued by the officers of the Land Department carries with it all legal presumption in support of their action. Lee v. Johnson, 116 U. S. 48.

84. In favor of the validity and integrity of a United States patent it must be presumed that all antecedent steps necessary to its issuance were duly taken. Iron Silver M. Co. v. Campbell, 17 Colo. 267; 29 Pac. Rep. 513. See S. C., 135 U. S. 286.

85. A patent passes government title to the surface and any veins or lodes beneath it not otherwise granted. Its issuance presumes a compliance with the mining laws. Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645.

86. The action of the Land Department in issuing a patent is conclusive as to legal title.

Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574.

87. The legal effect of a patent and its unassailability collaterally, considered and discussed. Johnson v. Townsley, 13 Wall. 72; French v. Fyan, 93 U. S. 169; Vance v. Burbank, 101 U. S. 514; Quinby v. Conlan, 104 U. S. 420; Steel v. St. Louis Sm. Co., 106 U. S. 447; Boggs v. Merced M. Co., 14 Cal. 380; 10 Mor. Min. Rep. 334.

88. The jurisdiction of the Land Department in issuing patents and the conclusiveness of such patents discussed at length. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

89. The boundaries of a claim as patented are conclusive as to the lines of location as against the patentee. Waterloo M. Co. v. Doe, 56 Fed. Rep. 685.

90. The issuance of a lode patent is conclusive proof that the claim is located on the apex of a vein. Iron Silver M. Co. v. Campbell, 17 Colo. 267; 29 Pac. Rep. 513. See S. C., 135 U. S. 286.

91. "It may be admitted, . . . that if, upon any state of facts, the patent might have been lawfully issued, the court will presume, as against collateral attack, that the facts existed; but that presumption has no place in a suit by the United States directly assailing the patent and seeking its cancellation for fraud," etc. Moffat v. United States, 112 U. S. 24; United States v. Minor, 114 U. S. 233.

92. In a controversy as to ownership of the vein on the dip, issuance of patent does not prove the correctness of the Land Department record as to the date of location, but this must be proven as any other matter would be. Last Chance M. Co. v. Tyler M. Co., 9 U. S. App. 613; 61 Fed. Rep. 557; Champion M. Co. v. Cons. Wyoming G. M. Co., 75 Cal. 78; 16 Pac. Rep. 513; Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645.

93. A patent to a railroad company is not conclusive evidence that the land is nonmineral in character; a party claiming under a subsequent mining patent may show that the land is mineral, and, upon such showing being made, his title will be quieted. Chicago Quartz M. Co. v. Oliver, 75 Cal. 194.

94. The certificate of the United States Surveyor General as to expenditure upon a mining claim may not be attacked after the issuance of patent if not given because of fraudulent representations by the claimant. United States v. Iron Silver M. Co., 128 U. S. 673.

95. Under section 2325, United States Revised Statutes, the certificate of the United States Surveyor General is evidence of the sufficiency of the work performed and improvements made upon a mining claim in his State, and in an action to annul a patent it is error to strike out of the answer that the Surveyor General for Montana took the evidence required by law, and decided that the work and improvements equaled $500. United States v. King, 9 Mont. 75.

96. An equitable title must yield to that which the patent conveys. United States v. Southern Colorado Co., 18 Fed. Rep. 273.

97. In an action of ejectment the legal title must prevail. The patent of the United States passes that title. Steel v. St. Louis Sm. Co., 106 U. S. 447.

98. A patent conveys the legal title, notwithstanding it is obtained by fraud. United States v. Minor, 114 U. S. 233; Meader v. Norton, 11 Wall. 442.

99. A patent is a quit-claim from the United States. Knight v. United States Land Ass'n, 142 U. S. 161.

100. A patent conveys not only the right to the use of the surface and to extract the minerals, but also a fee simple title in the land described. Town Site of Leadville, 9 C. L. O. 71.

101. The officers of the Land Department have no authority to insert in a patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribes. The patent of a placer mining claim carries with it the title to the surface ground included within the lines of the mining location, as well as the land beneath the surface. Deffeback v. Hawke, 115 U. S. 392.

102. The issue of patent for lands embracing mines, carries with it all mines in the lands patented to which no right had attached at time of issuance of patent. Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348.

103. A lode patent carries the lode located and all other lodes whose apexes are within the surface lines of the location. Iron Silver

M. Co. v. Cheesman, 2 McCrary, 191; 9 Mor. Min. Rep. 552.

104. An equitable interest in a mine is strengthened by patent. Harriet M. Co. v. Phœnix M. Co., 9 C. L. O. 165.

105. An intruder without title cannot question a United States patent. Erhardt v. Hogaboom, 115 U. S. 67.

106. The patent, like the deed of the individual, is inoperative if the government never owned the property, or had previously conveyed it, or had dedicated it to uses which precluded its sale. Steel v. St. Louis Sm. Co., 106 U. S. 447.

107. If land was not subject to entry at date of entry and patent, the patent is void, and innocent purchasers are not protected. Walden v. Knevals, 114 U. S. 378.

10. *Exclusions.*

108. The exclusion from entry and patent of a mining claim, of conflict with another claim, does not preclude the patentee from holding the excluded ground under his possessory title and raises no presumption against such title. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

109. An applicant for a mineral patent may make entry of his claim exclusive of land covered by an adverse claim and take patent for the land not in conflict, without waiving his possessory right to the excluded portion. Black Queen Lode v. Excelsior No. 1 Lode, 22 L. D. 343.

110. Patent will not issue for a lode mining claim where the land on which is situate the discovery and improvements is excluded from the entry, unless a discovery and the required expenditure are shown to have been made on entered ground. Antediluvian Lode and Mill Site, 8 L. D. 602; Thomas J. Laney, 9 L. D. 83.

111. Where the discovery and improvements are excluded from the entry of a mining claim, the entry will be canceled unless it is shown that mineral has been discovered and the requisite expenditure made upon claimed ground. A reconveyance by another lode claimant of the patented excluded ground will not be accepted, in such a case, as reinvesting title to the same in the government for the purpose of patenting it with the claim last entered. Winter Lode, 22 L. D. 362.

112. Assessment work done on the excluded portion of a claim for the benefit of the claimed portion may be counted, even if the excluded part is covered by an agricultural patent. Richards v. Wolfing, 98 Cal. 195; 32 Pac. Rep. 971.

11. *Grant.*

(See GRANT, p. 364.)

113. Coal lands are mineral lands, and as such are not subject to indemnity school selection by a State claiming under a grant of non-mineral lands. A patent issued to a State for lands known to be valuable for coal will be vacated on suit by the United States. United States v. Mullan, 118 U. S. 271. See S. C., 7 Sawy. 466; 10 Fed. Rep. 785.

114. Title to known mines does not pass to railroad companies by virtue of their grants. California & Oregon R. R. Co., 4 C. L. O. 2.

115. The discovery of the mineral character of land at any time prior to the issuance of patent therefor, under a grant excepting mineral land, will exempt the land from the operation of the grant. Central Pacific R. R. Co. v. Valentine, 11 L. D. 238.

116. If land within the limits of the grant to the Northern Pacific Railroad Company (from which all minerals other than coal and iron were excepted) is discovered to be mineral in character at any time before the issuance of patent therefor to the company, it is excepted from the grant. Barden v. N. P. R. R. Co., 154 U. S. 288. (Citing and approving C. P. R. R. Co. v. Valentine, 11 L. D. 288 — strong dissenting opinion.)

117. A patent to a railroad company will be set aside if the ground was known at the time to be mineral in character. McLaughlin v. United States, 107 U. S. 526; Western Pacific R. R. Co. v. United States, 108 U. S. 510.

118. Where by the terms of a patent mineral lands are excluded from the grant, it is competent for the party claiming adversely to the patentee to show that the land in dispute is mineral in character, and therefore excepted from the operation of the patent. McLaughlin v. Powell, 50 Cal. 64; 10 Mor. Min. Rep. 424.

119. A person claiming under a mineral location, to be entitled to the possession as against one claiming under a patent to a railroad company, must show that at date of

such patent the land was *known* to be more valuable for mining than for agricultural purposes, and in determining the relative value for such purposes, subsequent changes cannot be considered. Hunt v. Steese, 75 Cal. 630; 17 Pac. Rep. 920.

120. As long as a patent to a railroad company remains of record it is conclusive of the non-mineral character of the land at date of issuance of the patent, and a valid mining location cannot be made on the patented land. Cowell v. Lammers, 10 Sawy. 246; 21 Fed. Rep. 200; 8 West Coast Rep. 504.

121. Lands not known to be mineral in character at the date of issuance of patent therefor to a railroad company pass by the patent, even though the grant to the company excluded mineral land. Samuel W. Spong, 5 L. D. 193.

122. The mineral reservation clause is to be inserted in all patents for land issued to railroad companies. California & Oregon R. R. Co., 4 C. L. O. 2.

123. A patent from the United States for land in California, issued upon confirmation of claims held under grants of the Mexican government, invests the patentee with the ownership of the precious metals which the land may contain. Moore v. Smaw, and Fremont v. Flower, 17 Cal. 197; 12 Mor. Min. Rep. 418; Ah He v. Crippen, 19 Cal. 491; 10 Mor. Min. Rep. 867.

124. The locator of a mining claim, upon land under a confirmed Mexican grant, cannot attack a patent issued upon such Mexican grant on the ground of fraud. Manning v. San Jacinto Tin Co. (Cal. C. C.), 10 C. L. O. 181.

12. *How Attacked.*

125. A patent for lands issued by the United States is conclusive in an action at law as to the legal title, and cannot be collaterally impeached in such action, unless it is absolutely void on its face, or is issued without authority. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673. (Quoting Patterson v. Winn, 11 Wheat. 380, and citing Hoofnagle v. Anderson, 7 Wheat. 212; Boardman v. Reed, 6 Pet. 342; Bagnell v. Broderick, 13 Pet. 448; Johnson v. Towsley, 13 Wall. 72; Moore v. Robbins, 96 U. S. 585.)

126. The Land Department in issuing a patent must necessarily consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings against the patent. Steel v. St. Louis Sm. Co., 106 U. S. 447. (Citing United States v. Throckmorton, 98 U. S. 61; Vance v. Burbank, 101 U. S. 514; United States v. Flint, 4 Sawy. 42.)

127. A patent from the United States for land is conclusive in a court of law as to all matters properly determinable by the Land Department. If patent issued without jurisdiction, it may be collaterally impeached. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645; Boggs v. Merced M. Co., 14 Cal. 380; 10 Mor. Min. Rep. 334; Meyendorf v. Frohner, 8 Mont. 282; 5 Mor. Min. Rep. 559.

128. A patent cannot be attacked collaterally, but only by a direct proceeding instituted by the government or parties acting in its name and by its authority. Lee v. Johnson, 116 U. S. 48; Carter v. Thompson, 65 Fed. Rep. 329; Poire v. Wells, 6 Colo. 406; Green v. Barker, 66 N. W. Rep. 1032.

129. A patent is not to be collaterally attacked, nor to be impeached by trespassers. Cowell v. Lammers, 10 Sawy. 246; 21 Fed. Rep. 200; 8 West Coast Rep. 504.

130. A patent may not be attacked for fraud except in a direct proceeding which should be by *scire facias*, information, or a bill filed by, or in the name of, the United States. Boggs v. Merced M. Co., 14 Cal. 380; 10 Mor. Min. Rep. 334.

131. If the Land Department, in issuing a patent, acted without authority of law, or the lands patented were not within its jurisdiction, the patent is void, and may be shown so to be in an action at law. Polk's Lessee v. Wendal, 9 Cranch, 87; Patterson v. Winn, 11 Wheat. 380; Mayor, etc. v. United States, 10 Pet. 662; Wilcox v. Jackson, 13 Pet. 498; Stoddard v. Chambers, 2 How. 284; Easton v. Salisbury, 21 How. 426; Reichart v. Felps, 6 Wall. 160; Best v. Polk, 18 Wall. 112; Leavenworth, etc. R. R. Co. v. United States, 92 U. S. 733; Newhall v. Sanger, 92 U. S. 761; Sherman v. Buick, 93 U. S. 209; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Steel v. St. Louis Sm. Co., 106 U. S. 447;

U. P. R. R. Co. v. Dunmeyer, 113 U. S. 629; Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591; Doolan v. Carr, 125 U. S. 618; Hastings, etc. R. R. Co. v. Whitney, 132 U. S. 357; St. Paul, etc. R. R. Co. v. N. P. R. R. Co., 139 U. S. 18; Richmond M. Co. v. Rose, 114 U. S. 576. See S. C., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; N. P. R. R. Co. v. Cannon, 7 U. S. App. 507; Patterson v. Tatrum, 3 Sawy. 178; Cooper v. Robinson, 6 McLean, 93.

131a. Patents for lands which have been reserved from sale are void. Morton v. Nebraska, 21 Wall. 660; 12 Mor. Min. Rep. 451; Polk v. Wendal, 9 Cranch, 99; Minter v. Crommelin, 18 How. 88.

132. If a patent is issued contrary to the regulations of a mining district in force, it is void, at least in so far as it is so in conflict, and may be attacked collaterally. Parley's Park S. M. Co. v. Kerr, 130 U. S. 256.

133. A patent may be attacked by an individual only by showing that it conflicts with a prior vested right, and even then the patent will not be vacated, but only declared inoperative as to conflict with such right. Boggs v. Merced M. Co., 14 Cal. 380; 10 Mor. Min. Rep. 334.

134. A petition addressed to the General Land Office, asking a hearing with view to the recommendation of suit to vacate a patent, should be forwarded by the Commissioner to the Secretary with a recommendation, and the hearing should be ordered only by the Secretary. Butte & Boston M. Co., 21 L. D. 125.

135. The preliminary hearing had with a view to the recommendation of suit to vacate a patent should be at the expense of the one asking the suit. Alexander Moore, 2 L. D. 761; Departmental decision May 9, 1892, *In re* Lorin L. Wilcox. Such hearing should be with notice to all parties. Cameron Lode, 18 L. D. 369.

136. Where it is alleged that lands known to be mineral in character have been patented to a railroad company under a grant of non-mineral lands, a hearing should be ordered with a view to the recommendation by the Land Department of suit to vacate the patent. The United States, on such a state of facts, would be an interested party. Bullock v. Central Pacific R. R. Co., 11 L. D. 590.

13. *Land Department.*

(See LAND DEPARTMENT, p. 427.)

137. "The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all agents [*grants*] of land under the authority of the government." (Sec. 453, U. S. Rev. Stat.) Knight v. U. S. Land Ass'n, 142 U. S. 161.

138. The issuance of a patent terminates the jurisdiction of the Land Department over the land patented. Moore v. Robbins, 96 U. S. 530; Steel v. St. Louis Sm. Co., 106 U. S. 447; Rockwell v. Indian Widows, 1 L. D. 90; Heir of John Love, 2 L. D. 886; Baker v. State of California, 4 L. D. 137; Wisconsin Central R. R. Co. v. Stinka, 4 L. D. 344; Pueblo of San Francisco, 5 L. D. 483; Garriques v. Atchison, Topeka & Santa Fe R. R. Co., 6 L. D. 543; The Middle Grounds, 7 L. D. 255; Schweitzer v. Ross, 8 L. D. 70; John P. S. Voght, 9 L. D. 114; Louisa Goldstein, 10 L. D. 155; Pike's Peak Lode, 10 L. D. 200; 14 L. D. 47; Plymouth Lode, 12 L. D. 513; Protector Lode, 12 L. D. 662; Pacific Slope Lode, 12 L. D. 686; South Star Lode, 17 L. D. 280. (Modified, 20 L. D. 204.) Spirlock v. N. P. R. R. Co., 22 L. D. 92. The rule laid down by the above decisions is somewhat modified in the South Star Lode, 20 L. D. 204 (wherein it is held that, if it be shown to the satisfaction of the Land Department that a lode was known to exist within a patented placer claim at date of the application for the placer patent, patent may be issued for the lode claim by reason of the fact that known lodes not expressly embraced in the application for placer patent were excluded therefrom. See, also, Com'r to Denver Office, Nov. 16, 1895, *In re* Antediluvian Lode, in conflict with the patented town site of Central City).

139. The issuance of patent terminates the jurisdiction of the Land Department over the land covered thereby, and the patent can be invalidated only by judicial proceedings. Thomas J. Laney, 9 L. D. 83.

140. The issuance of a patent for public land terminates the jurisdiction of the Land Department to inquire into the character

thereof. Courtright v. Wisconsin Central R. R. Co., 19 L. D. 410.

141. "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed." Deffeback v. Hawke, 115 U. S. 392; Sparks v. Pierce, 115 U. S. 408.

142. "The officers of the Land Department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservation of the officers of the Land Department, resting for their fitness only upon the judgment of those officers." Davis' Adm'r v. Weibbold, 139 U. S. 507. See 7 Mont. 107. (Citing Deffeback v. Hawke, 115 U. S. 392.)

143. A reservation of the surface of a mining claim in favor of town site property rights is void. Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858.

144. The practice of inserting in town site and mineral land patents mutual clauses of reservation is adhered to. Rico Town Site, 1 L. D. 556. (Prior to decision in Deffeback v. Hawke, 115 U. S. 392.)

145. Acting under the rule laid down in Deffeback v. Hawke, 115 U. S. 392, it is ordered that the reservation of town site rights in mineral patents be discontinued. Departmental Instructions, Nov. 27, 1886, 5 L. D. 256.

146. There is no authority for a reservation of town site rights in a mineral patent. Harry Livingston Lode, 7 L. D. 319; W. A. Simmons, 7 L. D. 283; Antediluvian Lode and Mill Site, 8 L. D. 602.

147. Whether a patent is broader or narrower than the law under which it issues, it conveys that which the law says shall be conveyed. Stark v. Starr, 6 Wall. 402; Deffeback v. Hawke, 115 U. S. 392; Sullivan v. Iron Silver M. Co., 143 U. S. 431; Clary v. Hazlett, 67 Cal. 286; 7 Pac. Rep. 701; Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858; King v. Thomas, 12 Pac. Rep. 865.

148. A patent for a mining claim will not contain a reservation in favor of a tunnel claim. Tioga Cons. M. Co., 8 C. L. O. 88.

149. Where mining locations cross each other, and there is reason to believe that a contest may arise in the future, the rights of neither party should be prejudiced by unnecessary *habendum* or *reddendum* clauses in the patent. Adelaide Cons. S. M. & Sm. Co. v. Gallagher, 6 C. L. O. 73.

150. Where a patent has been issued containing a reservation not warranted by law, and the patentee refuses to accept it for that reason, the patent may be canceled and a proper one issued in lieu thereof. W. A. Simmons, 7 L. D. 283.

151. Where a mineral patent has been issued containing a clause reserving the rights of town site claimant (unwarranted by law), and the patentee refuses for that reason to accept the patent, it may be canceled and a hearing ordered to determine the rights of the parties. Harry Livingston Lode, 7 L. D. 319.

152. A land patent should be delivered to the person surrendering the receiver's duplicate receipt; but if such receipt has been lost, the entryman or agent may secure the patent by filing affidavit of its loss. Com'r to Central City Office, April 18, 1870, Copp's Min. Lands, 75; Com'r to G. A. Green, Sept. 21, 1891; Com'r to Moses M. Strong, Nov. 20, 1891.

153. While the general rule is, that the decisions by the Land Department on questions of fact preliminary to the issuance of a patent are conclusive after the issuance of patent, "where each party has a patent from the government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, we think it is competent, in any judicial proceeding where this question of superiority of title arises, to establish it by proof of those facts." Iron S. M. Co. v. Campbell, 135 U. S. 286. See 17 Colo. 267; 29 Pac. Rep. 513.

154. The Land Department in issuing a patent must necessarily consider and pass

upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Steel v. St. Louis Sm. Co., 106 U. S. 447.

155. "It is the established doctrine expressed in numerous decisions of this court, that whenever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that Department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition or mistake, its determination is conclusive against collateral attack." Barden v. N. P. R. R. Co., 154 U. S. 288.

156. The Land Department cannot except any part of the surface ground from the patent of a mining claim based on a prior location. If it does, its act to that extent is void, and it may be so declared in an action at law. Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

157. "It has been often said by this court that the land officers are a special tribunal of a *quasi* judicial character, and their decisions of the facts before them is conclusive. And we are not now controverting the principle that where a contest between individuals, for the right to a patent for public lands, has been brought before those officers, and both parties have been represented and had a fair hearing, that *those parties* are concluded as to all the facts thus in issue by the decision of the officers." United States v. Minor, 114 U. S. 233.

158. The Supreme Court does not interfere with the title of a patentee on an alleged mistake of fact, or from wrong conclusions drawn from the testimony by the Land Department. It is only a case of fraud that will warrant a court in looking into the evidence. Lee v. Johnson, 116 U. S. 48.

159. The issuance of a mineral patent renders *res judicata*, so far as the Land Department is concerned, the fact that the land was known to be mineral in character. Blackmore v. Reilly, 17 Pac. Rep. 72. (Citing and following Tombstone Town Site Cases, 15 Pac. Rep. 26.)

160. A patent cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves. Steel v. St. Louis Sm. Co., 106 U. S. 447.

161. "The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court." Mullan v. United States, 118 U. S. 271. (Quoting approvingly, United States v. Stone, 2 Wall. 525.)

162. The examination of an application for a patent may go beyond the papers in the case and into the general records of the Land Department, and if any part of the premises have been previously disposed of, an exception should be inserted in the patent. Seven Thirty Lode, 1 C. L. O. 82.

163. No one has power to cause the issuance of a patent without the authority of some statute. McGarrahan v. New Idria M. Co., 49 Cal. 331; 11 Mor. Min. Rep. 641.

164. The Secretary of the Interior exercises a supervisory authority over the Commissioner of the General Land Office, who, in turn, exercises the same authority over the local land officers. A purchaser of land upon the issuance of a certificate of entry by the local land office takes title subject to the re-examination of the entry and its possible cancellation. Sweigart v. Walker, 30 Pac. Rep. 162.

165. The Land Department cannot include in a town site patent any mine, mining claim or possession. If such is included in the patent, the same to that extent is void. Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574.

166. Where a patent issues for a lode which crosses a lode already patented, the surface ground in conflict is excepted from the second patent. James B. Belford, 2 C. L. O. 178.

167. Where a portion of a claim already entered is shown to belong to other parties than those named in the register's certificate,

the duplicate receiver's receipt may be filed with an assignment thereon when a patent can be issued. Seymour v. Wood, 4 C. L. O. 82.

168. Where application for patent is made by an administrator of the estate of a decedent, patent will issue to the heirs, generally, of the decedent. Henry Wood, Adm'r, 2 L. D. 762.

169. A patent should not issue to a person known to be deceased, but to his heirs, generally. Clara Huls, 9 L. D. 401; Instructions, 18 L. D. 49; Isom C. Murray, 18 L. D. 542.

170. Where the possessory title to a mining claim becomes vested (either by location or transfer) in one who dies before applying for a patent, if application and entry are made by the heirs, devisees, executor or administrator, patent will be issued in the name of the decedent, the Land Department refusing to pass upon the title of those claiming under the decedent. Com'r to Helena Office, March 25, 1896, *In re* Broadwater Placer.

171. A patent issued upon a coal entry, which was made for land not claimed, through error of description, may be surrendered to the Land Department, the land reconveyed to the government, proof furnished of nonalienation of the land patented, and the patent may be canceled and a new patent issued after amendment of the entry. Richard Gill, 8 L. D. 303.

172. In view of the errors in the first patent and the evidence to the effect that the resurvey covers the identical ground originally applied for, a new patent will be issued. Independent Quartz Mine, 11 C. L. O. 227.

173. Patent was issued based on an erroneous survey, but the notice of application for patent was so nearly correct as to be sufficient to put adverse claimants on their guard. In view of these facts, on the filing of a quitclaim deed of the patented land from the present owner to the United States, together with an abstract of title, a new and correct patent may be issued in the name of the original patentee without requiring republication. W. C. Childs, 13 C. L. O. 53.

174. Where a mineral patent issues based on an erroneous survey, a new patent in lieu thereof may not be issued without new notice, based on a correct survey, where the original survey is so erroneous as not to cover any portion of the claim. If such patentee refuses to surrender the erroneous patent and to reconvey the land covered thereby, suit to vacate the patent will be recommended by the Land Department. United States v. Rumsey, 22 L. D. 101.

175. If a patent has issued, erroneous or defective in some respect, after due and legal notice of application therefor, a new and correct patent may be issued upon the performance by the claimant of the following: The outstanding patent must be surrendered; the land described in said patent must be reconveyed to the United States, and a properly certified abstract of title must be furnished, showing title to the described land to have been in the person surrendering the patent and making such reconveyance at the dates of surrender and of reconveyance, whereupon the patent may be formally canceled on the records, and a new one issued. Com'r to G. E. Williams, June 5, 1893; Osmyn Harkness, 2 C. L. O. 98.

176. Where, however, the error in the patent was caused by an error in the survey of the claim, and the notices of application, based on said survey, failed to describe the claim with sufficient certainty to place adverse claimants on their guard, the first step toward the issuance of a new patent should be a new official survey of the claim. Then the steps above prescribed should be taken, and thereafter new notice of application for patent should be given in the usual manner, with the same rights to adverse claimants as under an original notice. Com'r to La Grande Office, May 26, 1896, *In re* Webfoot and Willamette Placers.

177. Patent cannot issue where the published notice of application incorrectly described the tracts embraced in a placer claim taken by legal subdivisions. Alvin B. Preston, 10 C. L. O. 34.

178. The respective undivided interests of co-patentees of a mining claim will not be stated in the patent. Com'r to Daniel Seymour, May 29, 1891.

14. *Lode — Placer.*

(See VEINS and PLACER, pp. 6 and 321.)

179. A placer patent conveys to the placer patentee full title to all lodes or veins within the territorial limits not then known to exist. Nothing disclosed after the issuance of patent can limit the effect of the patent or except from its scope any vein or lode not so

known. Sullivan v. Iron Silver M. Co., 143 U. S. 431.

180. A vein or lode that has never been claimed; that has not been located; that has not been marked out by metes and bounds, and in which there has been no actual development, is not excepted from a placer application and patent. Iron Silver M. Co. v. Sullivan, 5 McCrary, 274; 16 Fed. Rep. 829.

181. A lode within the limits of a patented placer claim, to be excepted from the placer patent, must have been known to exist at date of the application for the placer patent. Mere belief in the existence of the lode is not knowledge thereof. Iron Silver M. Co. v. Reynolds, 124 U. S. 374; S. C., 116 U. S. 687; 15 Mor. Min. Rep. 591 (first trial); United States v. Iron Silver M. Co., 128 U. S. 673. (Affirming S. C., 24 Fed. Rep. 568.)

182. A placer patent conveys title to a lode not then known to exist. Raunheim v. Dahl, 6 Mont. 167; 9 Pac. Rep. 892. (See S. C., 132 U. S. 260.) Montana Copper Co. v. Dahl, 6 Mont. 131; 9 Pac. Rep. 894.

183. A patent for a placer claim carries title to all veins or lodes within said claim not known at date of application for placer patent. Maggie Lode, 14 L. D. 655.

184. A lode to be excepted from a placer patent must have been known to be valuable enough to justify exploitation at date of application for the placer patent. Brownfield v. Bier, 15 Mont. 403; 29 Pac. Rep. 461.

185. Lodes unknown at date of placer application, but discovered prior to issue of patent, do not exclude surface ground or the lode from placer patent. War Dance Lode v. Church Placer, 1 L. D. 549.

186. To be excepted from a placer patent a lode must have been known to exist at the date of the application for such patent. Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394; Sullivan v. Iron Silver M. Co., 143 U. S. 431.

187. A known vein to be excepted from a placer patent must possess qualities not required to render a vein subject to location under section 2320, United States Revised Statutes; *i. e.*, it must be capable of being profitably worked at date of placer application. Montana Central Ry. Co. v. Migeon, 68 Fed. Rep. 811.

188. To be excepted from a placer patent a lode need not have been located at date of the application for such patent. "It is enough that it be known, and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises," etc. Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394; Sullivan v. Iron Silver M. Co., 143 U. S. 431; Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591; Iron Silver M. Co. v. Reynolds, 124 U. S. 374; Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

189. The formal location of a lode is not necessary to exclude it from a placer patent, the only requisite to such exclusion by operation of law being (1) that it was known to exist at date of application for the placer patent, and (2) that it was not included in such application. Railroad Lode v. Noyes Placer, 9 L. D. 26.

190. The title to all veins or lodes within a placer claim known to exist at date of the placer application for patent, and not included in such application, remains in the United States, and the placer patentee or his grantees have no right to dispossess any one in the peaceable possession of such vein or lode, whether the latter have any title or not. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

191. The question of whether or not a lode was known to exist within a placer claim at date of the application for placer patent is always one for an ultimate decision by the courts. After the Land Department has issued a patent for the placer claim its jurisdiction over the land patented has ceased, and the only way the title of the patentee can be impeached is by proper proceedings in court. Iron Silver M. Co. v. Campbell, 135 U. S. 286.

192. The validity of a placer patent and its extent, as to conflict with a lode alleged to have been known at date of application for the placer patent, are questions that may be determined only by the courts. Pikes Peak Lode, 10 L. D. 200. (Overruled in South Star Lode, 20 L. D. 204.)

193. Where it is ascertained by inquiry instituted by the Department, or determined by a court of competent jurisdiction, that a lode claim exists within the boundaries of

land covered by a placer patent, and that such lode was known to exist at the date of application for such patent and was not applied for, it must be held that the land embraced in said lode claim is reserved from the operation of the conveyance by the general terms of exception therein, and that patent may issue therefor if the law has been in other respects complied with. Pikes Peak Lode, 10 L. D. 200; 14 L. D. 47 (overruled); South Star Lode (review), 20 L. D. 204; Butte & Boston M. Co., 21 L. D. 125.

194. Where an application for patent under the lode mining laws is made for land already patented to another under the placer mining laws, the provision of section 2326, United States Revised Statutes, does not require the placer patentee to adverse the application of the lode claimant, as only those holding mining claims by possessory title are required to proceed under that law. Iron Silver M. Co. v. Campbell, 135 U. S. 286.

195. The issuance of a placer patent will not preclude the issuance of a patent for a lode claim situate within the placer, and known at the date of the application for the placer patent. Robinson v. Roydor, 1 L. D. 564.

196. A placer patentee cannot be called upon to defend his title against a lode claimant before the Land Department. Iron Silver M. Co. v. Campbell, 135 U. S. 286.

197. Where it appears to the satisfaction of the Land Department that a lode was known at date of placer application for patent, the lode, with surface ground twenty-five feet on each side, may be patented notwithstanding the issuance of the placer patent. Shonbar Lode, 1 L. D. 551; 3 L. D. 388. See Pikes Peak Lode, 10 L. D. 200, and South Star Lode, 20 L. D. 204.

198. Where a placer patentee has filed an adverse claim against the application for patent for a lode claim within the placer, and has begun suit thereon, the Land Department will take no action, but will leave the parties to secure a determination of their rights in court. Iron Silver M. Co. v. Mike & Starr M. Co., 6 L. D. 533.

199. The owner of a lode claim covered by an application for a placer patent is not obliged to adverse the placer application, for his claim is excepted from the operation of the placer patent by law. Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611. (Affirming 5 Mont. 274; 5 Pac. Rep. 856.)

200. A lode within a placer claim, known at date of application for placer patent, is carved out of the placer patent. Dahl v. Raunheim, 132 U. S. 260; Clary v. Hazlitt, 67 Cal. 286; 7 Pac. Rep. 701.

201. Section 2333, United States Revised Statutes, carves out of a placer patent all lodes known within the placer at date of application therefor, with twenty-five feet of surface ground on each side. Becker v. Sears, 1 L. D. 577.

202. In an action by the patentee of a placer claim to recover possession of a vein or lode within its boundaries, an answer alleging that the vein or lode was known to the patentee to exist at the time of applying for the patent, and was not included in the placer application, well pleads the fact which, under section 2333, United States Revised Statutes, precludes the patentee from having any right of possession of the vein or lode. Sullivan v. Iron Silver M. Co., 109 U. S. 550.

203. Where a vein or lode is known to exist under the surface included in a placer patent, and is not in a placer claimant's possession, and not mentioned in the claim on which the patent issues, the title to such vein or lode remains in the United States unless previously conveyed to someone else; and does not pass to the placer patentee, who thereby acquires no interest in such vein or lode. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

204. In procuring a patent for a placer claim under section 2333, United States Revised Statutes, where the claimant is also in possession of a lode or vein included within the boundaries of his placer claim, the patent shall cover both, if he makes this known and pays $5 per acre for twenty-five feet on each side of his vein, and $2.50 per acre for the remainder of his placer claim. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

205. A patent to a placer under section 2333, United States Revised Statutes, passes no title to a previously located lode within its boundaries. Whether or not the placer applicant knew of its existence is immaterial. Mantle v. Noyes, 5 Mont. 274; 5 Pac. Rep. 856. See S. C., 127 U. S. 348; 15 Mor. Min. Rep. 611.

206. After the issuance of a placer patent, the owner of a lode therein, located with surface ground twenty-five feet on each side, may not so amend his location as to take in a greater amount of surface ground. Becker v. Sears, 1 L. D. 577.

207. The owner of a lode alleged to have been known at date of application for patent to a placer (since patented) covering the lode, should apply for patent in the usual manner and allow the placer patentee to adverse should he desire. Olathe Placer, 4 L. D. 494.

208. An application for a lode claim in conflict with a patented placer may not be received by the Land Department as long as the placer patent remains outstanding. If the placer patent was issued upon false proofs, suit to vacate the same should be brought by the United States. Pikes Peak Lode, 10 L. D. 200. (Overruled by South Star Lode, 20 L. D. 204.)

209. On a sufficient showing by the applicant for a lode claim situate in a patented placer, a hearing may be ordered to determine whether the lode was known at the date of the placer application, with the view of recommending suit by the United States Attorney General to vacate the placer patent as to the conflict. Pikes Peak Lode, 14 L. D. 47. (Modified by South Star decision, 20 L. D. 204.)

210. The entry of a lode claim conflicting with a patented placer may be suspended to allow the lode claimant opportunity to show at a hearing that the lode was known at date of placer application, with the view to the recommendation of suit to vacate the patent for the placer claim. Rebel Lode, 12 L. D. 683. (Modified in South Star Lode, 20 L. D. 204.)

211. The limitation of the width of a lode claim within a placer, prescribed by section 2333, United States Revised Statutes, has no application to a case where a lode was covered by a valid location of the full legal extent prior to the application for placer patent, but the whole lode claim is excepted from the placer patent. Pikes Peak Lode, 10 L. D. 200.

212. Section 2333, United States Revised Statutes, has no application to a legally located vein or lode within the boundaries of a placer claim. Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

213. Where an applicant for a lode patent shows the lode to have been known at date of application for a patented placer, with which it conflicts, instead of incurring the expense of recommending suit by the United States to vacate the placer patent as to the conflict, the Land Department may accept a reconveyance of the land to the United States, which would reinvest the Department with jurisdiction over it. Juniata Lode, 13 L. D. 715.

214. After the issuance of a placer patent the Land Department will not assume that a lode was known to exist within the placer claim because of the fact that a lode claim was located therein prior to the placer application. The known existence of the lode at that date must be shown as a fact by proof. Valley Lode, 22 L. D. 317.

215. In assuming to issue patent for a lode claim alleged to have been known at the date of application for a placer patent (since issued) covering the land, the Department will proceed with caution, and will require the known existence of such lode at that date to be clearly shown. Departmental decision of May 18, 1896, *In re* Lucy L. Lode.

216. A patent for a lode claim which is situated within the boundaries of a placer claim covered by a prior patent is not conclusive of the fact that the lode so patented was known to exist at date of the application for the placer patent, and hence excepted from the placer patent. Iron Silver M. Co. v. Campbell, 135 U. S. 286. See 17 Colo. 267; 29 Pac. Rep. 513.

217. A patent cannot embrace "a placer and ledge when such claims are not contiguous and the ledge is entirely without the placer location." Com'r to Henry O'Connor, Jan. 10, 1879, 5 C. L. O. 162.

15. *Mill Site.*

(See MILL SITE, p. 355.)

218. A mill site is a mining claim or possession under section 2392, United States Revised Statutes, and is excepted from a town site patent if located prior to town site entry. Hartman v. Smith, 7 Mont. 19; 14 Pac. Rep. 648.

16. *Record.*

219. When the patent has been executed by the President and recorded in the General

Land Office, all power of the Executive Department over it has ceased, and title has passed, whether or not the patent has been delivered to the patentee, title by patent being by record and not by deed. Meader v. Norton, 11 Wall. 442; United States v. Schurz, 102 U. S. 378; Bicknell v. Comstock, 113 U. S. 149; United States v. Minor, 114 U. S. 233; Eltzroth v. Ryan, 89 Cal. 135; Alvarado v. Nordholt, 95 Cal. 116; Sayward v. Thompson, 11 Wash. St. 706; 40 Pac. Rep. 379; Rockwell v. Indian Widows, 1 L. D. 90; Schweitzer v. Ross, 8 L. D. 70; Stein v. Wogan, 21 L. D. 199; Spirlock v. N. P. R. R. Co., 22 L. D. 92.

220. When a patent for part of the public lands has been regularly signed by the President and sealed with the seal of the government, countersigned by the Recorder of the Land Office and duly recorded, the right to its possession by the grantee is perfect, and a writ of *mandamus* will lie to the officer in whose possession it is, to compel its delivery. United States *ex rel.* McBride v. Schurz, 102 U. S. 378.

221. A patent, signed, sealed and recorded, passes title and belongs to the patentee. Stein v. Wogan, 21 L. D. 199.

222. Patent title is title by record, and neither delivery to the patentee nor recording in the office of the county recorder are essential to its validity. Sayward v. Thompson, 11 Wash. St. 706; 40 Pac. Rep. 379.

223. A patent regularly issued and recorded passes title without delivery to the patentee and terminates the jurisdiction of the Land Department. Schweitzer v. Ross, 8 L. D. 70.

224. The mutilation (without the consent and against the protest of the grantee) of a patent for public land, by the Commissioner of the General Land Office, after its due execution and recordation, and a mutilation of the record, cannot affect the validity or force of the patent. Bicknell v. Comstock, 113 U. S. 149.

225. A patent for lands must be signed in the name of the President, either by himself or by his duly appointed Secretary, sealed with the seal of the General Land Office and countersigned by the Recorder of the Land Office. Until all these have been done no patent has been executed. McGarrahan v. New Idria M. Co., 96 U. S. 816.

226. Failure of the General Land Office to record a patent does not defeat the right of the patentee. McGarrahan v. New Idria M. Co., 49 Cal. 331; 11 Mor. Min. Rep. 641. But see S. C., 96 U. S. 316.

227. Title by patent does not pass until the record of the patent is completed. Antonio D. Martinez, 1 L. D. 18–22.

228. A patent inadvertently issued, and not accepted by the patentee, may, with his consent, be canceled by the Land Department. Eastlake Land Co. v. Brown, 9 L. D. 322.

229. A patent is presumed to have been accepted by the patentee in the absence of a contrary showing. Alvarado v. Nordholt, 95 Cal. 116.

17. *Relation.*

230. The valid location of a mining claim is a grant from the government to the person making the location. The location is the inception of the grant, and the patent is its consummation. The grant is kept alive by representation (work). A failure to represent forfeits the grant, and makes void the title acquired by location, and the ground thereupon becomes again subject to location and purchase. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

231. A valid location is the inception of a grant from the United States, the patent being the consummation, and the property located may not be sold by the United States unless forfeited. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345; Garfield M. & M. Co. v. Hammer, 6 Mont. 58; 8 Pac. Rep. 153. See S. C., 130 U. S. 291.

232. "It [location] is a title given by an act of Congress, and hence equivalent to a patent of the United States." Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

233. A patent relates back to the initiation of the patentee's right, by the location of the ground in accordance with law. Taylor v. Brown, 5 Cranch, 234; Stark v. Starr, 6 Wall. 403; Henshaw v. Bissell, 18 Wall. 266; Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683; 7 U. S. App. 463; 54 Fed. Rep. 284; 9 U. S. App. 613; 61 Fed. Rep. 557; 15 U. S. App. 456.

234. A patent relates back to the date of a valid mining location on which it is based. Heydenfeldt v. Daney G. & S. M. Co., 93 U. S. 634; 13 Mor. Min. Rep. 204.

235. When a patent issues, it relates back to the inception of the right of the patentee. Deffeback v. Hawke, 115 U. S. 392.

236. A patent relates back to the date of location of the claim, subject to prior patents regularly issued. Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 9 Mor. Min. Rep. 578.

237. A patent title, when granted, relates back to the first initial valid step which is the foundation of the right, and in pursuance of which the patent is issued. Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645.

238. A mining patent is conclusive proof of discovery and location according to law. Such patent takes effect by relation as of date of the location. Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

239. A patent relates back to the location so as to cut off intervening adverse rights. Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858.

240. A location notice is proper evidence in connection with the patent to show the claim to which the patent refers. Goller v. Fett, 80 Cal. 481; 11 Mor. Min. Rep. 171.

241. A legal entry of public lands is equivalent to the issuance of patent therefor as between the entryman and third persons, the government thereafter holding only the naked legal title in trust for the entryman who holds the equitable title. The patent, when issued, relates back to the inception of the right of the patentee. Carroll v. Safford, 3 How. 441; Witherspoon v. Duncan, 4 Wall. 210; Hughes v. United States, 4 Wall. 232; Heydenfeldt v. Daney G. & S. M. Co., 93 U. S. 634; 13 Mor. Min. Rep. 204; Wirth v. Branson, 98 U. S. 118; Steel v. St. Louis Sm. Co., 106 U. S. 447; Deffeback v. Hawke, 115 U. S. 392; Astrom v. Hammond, 3 McLean, 107; Carroll v. Perry, 4 McLean, 26; Union M. & M. Co. v. Danberg, 2 Sawy. 450; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348; Hamilton v. Southern Nevada G. & S. M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314; United States v. Freyburg, 32 Fed. Rep. 195; Gwynne v. Niswanger, 15 Ohio, 368; People v. Shearer, 30 Cal. 648; Blackley v. Coles, 6 Colo. 350; Poire v. Wells, 6 Colo. 406; Omaha & Grant Sm. & Red. Co. v. Tabor, 13 Colo. 41; 21 Pac. Rep. 925; Ross v. Supervisors, 12 Wis. 38; Goodlet v. Smithson, 5 Porter (Ala.), 246; 30 Am. Dec. 561; F. P. Harrison, 2 L. D. 767.

242. A legal entry of public land vests the equitable title thereto in the entryman, the United States thereafter holding the legal title in trust for the entryman until a patent issues, and this right cannot be defeated by an order of the Land Department, issued without warrant of law, canceling the entry. Cornelius v. Kessel, 128 U. S. 456.

243. A United States patent, when issued, relates back to the date of the entry upon which it is based. Bagnell v. Broderick, 13 Pet. 448; Gibson v. Choteau, 13 Wall. 93; Shepley v. Cowan, 91 U. S. 330; Wirth v. Branson, 98 U. S. 118; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Hayner v. Stanley, 8 Sawy. 225; 13 Fed. Rep. 217; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348; Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581; City of Denver v. Mullen, 7 Colo. 345; Struby-Estabrook Co. v. Davis, 18 Colo. 93; Courchainer v. Bullion M. Co., 4 Nev. 374; Deno v. Griffin, 20 Nev. 249; 20 Pac. Rep. 308; Alta M. & Sm. Co. v. Benson M. & Sm. Co., 16 Pac. Rep. 565.

244. A mineral entry so long as it is uncanceled confers the same right as a United States patent. Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581.

245. A vested right to a patent is equivalent to a patent. Last Chance M. Co. v. Tyler M. Co., 15 U. S. App. 456.

246. An entry of a mining claim made, is equivalent to a patent issued. Smith v. Van Clief, 6 C. L. O. 2.

247. A right to a patent once vested is equivalent to a patent issued. When patent issues it relates back to the inception of the right of the patentee, so far as necessary to cut off intervening claimants. F. P. Harrison, 2 L. D. 767.

248. A certificate of a mineral entry may not be collaterally assailed any more than may be a patent. Hamilton v. Southern Nevada G. & S. M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314.

249. When, between the dates of making a mineral entry and the issuance of a patent, the entryman sells the claim, the grantee holds under the patent, which relates back to the date of entry. Brown v. Warren, 16 Nev. 239.

250. The failure of an applicant to perform annual labor on his claim between the dates of application for patent and of entry will subject the claim to relocation. McNeil v. Pace, 8 L. D. 267.

251. It is a general rule of law that a certificate of entry, like a patent, is conclusive of legal title; but this rule will not be followed where entry was made by defendant in an adverse suit after the dismissal of such suit, where the suit was thereafter reinstated, and the cause will be tried as though it had never been dismissed. McEvoy v. Hyman, 25 Fed. Rep. 539; 15 Mor. Min. Rep. 300.

252. Judicial notice may be taken of the general course of business in the Federal Land Office, in that a purchase commonly precedes the issue of a patent a considerable time. Fisher v. Hallock (Mich. S. C.), 10 C. L. O. 159.

18. *Statute of Limitations.*

(See STATUTES OF LIMITATIONS, p. 383.)

253. The Statute of Limitations cannot run against the United States. Hence it cannot run against a claimant to public lands until the issuance of patent. Redfield v. Parks, 132 U. S. 239.

254. The Statute of Limitations does not run against the United States, and hence cannot run as to public lands until issuance of patent therefor. Gibson v. Choteau, 13 Wall. 93; Richardson v. Williamson, 24 Cal. 289; Reed v. Spicer, 27 Cal. 57; 4 Mor. Min. Rep. 330; Irvine v. Tarbat, 105 Cal. 237; Vansickle v. Haines, 7 Nev. 249; 15 Mor. Min. Rep. 201. (Overruled in Jones v. Adams, 19 Nev. 78.)

255. Until a patent issues the legal title to land entered is in the United States. Therefore, a town lot owner claiming adversely to a mining claimant cannot set up the Statute of Limitations as having begun to run before the issuance of patent on the mining claim. King v. Thomas, 12 Pac. Rep. 865; Mayer v. Carrothers, 36 Pac. Rep. 182.

256. The Statute of Limitations does not commence to run against parties claiming under a patent confirming a Mexican grant until the date of the issuance of patent, if the adverse claimant does not show the existence of a perfect grant prior to the issuance of patent. Tuffree v. Polhemus, 108 Cal. 670.

257. The Statute of Limitations may not be evaded by private persons by bringing suit to vacate a patent in the name of the United States. Curtner v. United States, 149 U. S. 662.

19. *Town Site.*

(See TOWN SITE, p. 451. See also secs. 2386–2392, Rev. Stat., and sec. 16 of the Act of March 3, 1891; 26 Stat. 1095.)

258. "Thus read, they must be held, we think, merely to prohibit the passage of title under the provisions of the Town Site Laws, to mines of gold, silver, cinnabar or copper, which are known to exist, on the issue of the town site patent, and to mining claims and mining possessions, in respect to which such proceedings have been taken under the law or the custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The exceptions of mineral lands from pre-emption and settlement and from grants to States for universities and schools, for the construction of public buildings and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining States which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral' in the sense of this statute is applicable." Davis' Adm'r v. Weibbold, 130 U. S. 597. (Citing and approving Alford v. Barnum, 45 Cal. 482; 10 Mor. Min. Rep. 422; Merrill v. Dixon, 15 Nev. 401; Cowell v. Lammers, 10 Sawy. 246; 21 Fed. Rep. 200; 3 West Coast Rep. 504; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348; United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486; Dughi v. Harkins, 2 L. D. 721; Samuel W. Spong, 5 L. D. 193; Cleghorn v. Bird, 4 L. D. 478; Commissioners of Kings County v. Alexander, 5 L. D. 126; Magalia G. M. Co. v. Ferguson, 6 L. D. 218; Nicholas Abercrombie, 6 L. D. 393; John Downs, 7 L. D. 71; Cutting v. Reininghaus, 7 L. D. 265; Creswell M. Co. v. Johnson, 6 L. D. 440; Thomas J. Laney, 9 L. D. 83.)

259. A lode known to exist at date of the issuance of a town site patent covering the

same (or at date of the town site entry) is subject to subsequent location notwithstanding the issuance of said patent. Moyle v. Bullene, 44 Pac. Rep. 69 (Colo.).

260. A claimant under a town site patent which contained the usual exception of mining claims acquired no interest in a valid mining claim or in the surface thereof. Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858.

261. A known mining claim is excepted from a town site patent. Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858; King v. Thomas, 12 Pac. Rep. 865.

262. Where a mining claim is located upon land afterwards entered as a town site, the prior issuance of the town site patent does not affect the mining location, since the mining patent, when issued, takes effect from the date of the location of the claim by relation. Chambers v. Jones, 17 Mont. 156.

263. A town site entry and patent are "inoperative as to all lands known at the time to be valuable for their mineral, or discovered to be such before their occupation or improvement for residence or business under the town site title." Deffeback v. Hawke, 115 U. S. 392. (Followed in W. A. Simmons, 7 L. D. 283.)

264. Land covered by a town site patent may not be entered under the mineral land laws because discovered, after the town site entry, to be valuable for mineral. Thomas J. Laney, 9 L. D. 83.

265. Proof of the sale of the claim two years after the issuance of the town site patent is not proof of the known mineral value of the land at the date of said patent. Richards v. Dower, 81 Cal. 44; 22 Pac. Rep. 304. See S. C., 151 U. S. 658.

266. A lode is located, but the location certificate is defective for uncertainty. A town site entry is then made. Then the location is amended. Two patents issued. *Held*, that the location being invalid might not be amended after the intervention of adverse town site rights. Tombstone Town Site Cases, 15 Pac. Rep. 26.

267. Land not known to be mineral at the date of town site entry passes by the town site patent. Tombstone Town Site Cases, 15 Pac. Rep. 26.

268. A mining claim was worked until 1869, and was then abandoned. A town site patent issued in 1869 covering the claim. The claim was located subsequently in 1884. *Held*, that the claim was not such a mine as would be excepted from the town site patent. Richards v. Dower, 81 Cal. 44; 22 Pac. Rep. 304. See S. C., 151 U. S. 658.

269. A lode to be excepted from a town site patent need not have been located at the date of the town site entry. It is excepted if known. Dower v. Richards, 73 Cal. 477; 15 Pac. Rep. 105.

270. After patent has issued for a town site a miner may not locate a claim inside the patented limits and then attack the validity of the town site patent on the ground that the land located was known to be mineral at the date of the town site entry. The patent must be attacked directly, if at all. Carter v. Thompson, 65 Fed. Rep. 329.

271. An applicant for a patent to a lode claim in a patented town site may, upon making a proper showing, be allowed a hearing to prove the known existence of the lode at the date of the town site entry, with a view to the recommendation by the Land Department of suit to vacate the town site patent as to the conflict. Thomas J. Laney, 9 L. D. 83; Plymouth Lode, 12 L. D. 513; Protector Lode, 12 L. D. 662; Pacific Slope Lode, 12 L. D. 686; Cameron Lode, 13 L. D. 369.

272. As sections 2386 and 2392, United States Revised Statutes, except known mines and valid mining claims from the operation of town site patents, if it is shown to the Land Department that a mine or valid mining claim was known to exist within the boundaries of a patented town site at the date of the town site entry, patent will be issued therefor to the mineral claimant. Com'r to Denver Office, Nov. 16, 1895, *In re* Antediluvian Lode.

273. Where the applicant for patent for a lode claim situate within a patented town site shows such lode to have been known at the date of the town site entry, he may procure a reconveyance of the conflict by the town site to the United States and thus reinvest the Land Department with jurisdiction to patent the claim. Pederson Lode v. Black Hawk Town Site, 14 L. D. 186.

274. Patents may be issued for a town site and for a mining claim covering the same

land with a reservation in each of the rights of the other claimant. Rico Town Site, 1 L. D. 556; M. A. Hickey, 3 L. D. 83. *Contra*, Deffeback v. Hawke, 115 U. S. 392.

275. In an ejectment suit where plaintiff shows title by patent for a mining claim, and defendant admits possession for town site purposes, plaintiff is entitled to judgment without showing that the surface is necessary to the working of his mine. Abbott v. Primeaux, 16 Nev. 361.

276. It is no objection to the issuance of patent for a lode claim that an application has been made for a town site patent. South Comstock G. & S. M. Co., 2 C. L. O. 146.

20. *Trust.*

(See TRUSTEE, p. 457.)

277. Where one party wrongfully obtains the legal title to land by a United States patent, which in equity and good conscience belongs to another, whether he acts in good faith or otherwise, he will be charged in equity as a constructive trustee of the equitable owner. Lindsey v. Hawes, 2 Black, 554; Stark v. Starr, 6 Wall. 402; Silver v. Ladd, 7 Wall. 219; Johnson v. Towsley, 13 Wall. 72; Moore v. Robbins, 96 U. S. 530; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Rector v. Gibbon, 111 U. S. 276; Bohall v. Dilla, 114 U. S. 47; Richmond M. Co. v. Rose, 114 U. S. 576. (See S. C., 17 Nev. 25; 25 Pac. Rep. 1105; 2 Colo. Law Rep. 7.) Sparks v. Pierce, 115 U. S. 408; Lee v. Johnson, 116 U. S. 48; Cornelius v. Kessel, 128 U. S. 456; Sanford v. Sanford, 139 U. S. 642. (See 13 Pac. Rep. 602.) Hardy v. Harbin, 4 Sawy. 549; Lakin v. Sierra Buttes G. M. Co., 11 Sawy. 231; 25 Fed. Rep. 337; Boggs v. Merced M. Co., 14 Cal. 279; 10 Mor. Min. Rep. 334; S. C., 3 Wall. 304; Salmon v. Symonds, 30 Cal. 301; Wilson v. Castro, 31 Cal. 420; Bludworth v. Lake, 33 Cal. 256; Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Meyendorf v. Frohner, 3 Mont. 282; 5 Mor. Min. Rep. 559; South End M. Co. v. Tinney (strong dissenting opinion), 35 Pac. Rep. 89.

278. "To charge the holder of the legal title to land under a patent of the United States, as trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the government, and that in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant." Bohall v. Dilla, 114 U. S. 47.

279. "Mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them. To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected, would have given him the patent." (Citing Bohall v. Dilla, 114 U. S. 47.) Sparks v. Pierce, 115 U. S. 408; Stark v. Starr, 6 Wall. 402; Silver v. Ladd, 7 Wall. 219; Moore v. Robbins, 96 U. S. 530; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Boggs v. Merced M. Co., 14 Cal. 279; 10 Mor. Min. Rep. 334; S. C., 3 Wall. 304.

280. One suing a patentee to have him declared a trustee of the legal title for him must show that he is entitled to the patent, not merely that patent erroneously issued, for that could be material only in a direct proceeding to vacate the patent. Meyendorf v. Frohner, 3 Mont. 282; 5 Mor. Min. Rep. 559.

281. If the officers of the Land Department mistake the law applicable to the facts, or misconstrue the statute and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. Lee v. Johnson, 116 U. S. 48; Puget Mill Co. v. Brown, 15 U. S. App. 274.

282. The patentee of a mining claim may be declared trustee for one who failed to adverse, if such failure was caused by fraud on the part of the patentee. Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240.

283. Where a patent has issued to one other than the one to whom it should have issued, the proper remedy is to have the patentee declared a trustee for the other person, not to have the patent vacated. Stark v. Starr, 6 Wall. 402.

284. In order to ascertain which party is entitled to a mining patent it is only necessary to determine which party at the time of its issue was the rightful owner of the mining claim in question, as against everybody but the United States, under the laws, rules, customs and decisions of the courts in force at the time in the locality embracing it. 420 M. Co. v. Bullion M. Co., 8 Sawy. 634; 9 Nev. 240; 11 Mor. Min. Rep. 608.

285. Where a mineral patent is secretly obtained by fraud to the injury of a third person, the patentee will be declared a trustee for the person rightfully entitled to the patent. Lakin v. Sierra Buttes G. M. Co., 11 Sawy. 231; 25 Fed. Rep. 337.

286. Where a patent is obtained, by a literal compliance with the legal requirements, for land really belonging to a third person, the patentee may be declared trustee for the person really entitled to the land. Lakin v. Sierra Buttes G. M. Co., 11 Sawy. 231; 25 Fed. Rep. 337.

287. Where a claim has been abandoned after publication of notice of application therefor, and then relocated by a stranger, and subsequently entered by, and patented to, the applicant, the patentee will be declared trustee for the relocator. (Strong dissenting opinion.) South End M. Co. v. Tinney, 35 Pac. Rep. 89.

288. If a patent is issued to the wrong party, he may be declared trustee for the rightful owner; but if the patent issued without authority of law it is void, and neither party can claim anything under it. Rose v. Richmond M. Co., 17 Nev. 25; 25 Pac. Rep. 1105; 2 Colo. Law Rep. 7; S. C., 114 U. S. 576.

289. The patent, like the deed of the individual, is inoperative if the government never owned the property, or had previously conveyed it, or had dedicated it to uses which precluded its sale. Steel v. St. Louis Sm. Co., 106 U. S. 447.

290. Where parties have acquiesced for eight years in a decision of the local land office dismissing their application for a mineral patent, and the land has meantime been patented to another, they have no standing in a court of equity for the purpose of attacking the patent. United States v. Marshall M. Co., 129 U. S. 579.

21. *Vacation.*

AN ACT to amend section eight of an act approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, be and the same is hereby amended so as to read as follows:

"SEC. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain: *Provided*, That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for cutting of timber on mineral lands.

Approved, March 3, 1891. (26 Stat. 1093.)

Slightly amending sec. 8 of an act of the same date and title. (26 Stat. 1095.)

291. The United States has the same remedy in a court of equity to set aside or annul a patent for land, on the ground of fraud in its procurement, that an individual would have to secure the cancellation of a deed fraudulently procured. United States v. Minor, 114 U. S. 233; United States v. Rose, 24 Fed. Rep. 196.

292. The right of the United States to bring suit to vacate a land patent exists only when the government has an interest in the

remedy sought by reason of its interest in the land or that fraud has been practiced on the government, to its prejudice, or it is under obligations to make good title for some one other than the patentee, or where public policy demands. United States v. San Jacinto Tin M. Co., 125 U. S. 273. (Affirming S. C., 23 Fed. Rep. 279.) United States v. Beebe, 127 U. S. 338.

293. The Attorney General of the United States has authority to bring suit on behalf of the United States to vacate a land patent. United States v. San Jacinto Tin M. Co., 125 U. S. 273. (Affirming S. C., 23 Fed. Rep. 279.) United States v. Beebe, 127 U. S. 338.

294. Suit to vacate should be brought in the name of the United States. Western Pacific R. R. Co. v. United States, 108 U. S. 510.

295. A bill in chancery brought in the name of the United States to vacate a patent cannot be made to serve as a writ of error or as a motion for a new hearing, or as a motion for a new trial of the case as decided by the Land Department. United States v. Marshall M. Co., 129 U. S. 579.

296. Fraud such as will warrant suit to set aside patent must be fraud extrinsic to the matter tried in the land office. United States v. White, 17 Fed. Rep. 561; United States v. San Jacinto Tin M. Co., 125 U. S. 273. See S. C., 23 Fed. Rep. 279.

297. Where a patent erroneously issues for land which the United States is required by law to convey to one other than the patentee, the United States will bring suit to vacate. Hughes v. United States, 4 Wall. 232.

298. If land known to be valuable for mineral is patented to a railroad company under a grant excepting mineral lands, the United States has such an interest in the matter as would warrant the Secretary of the Interior in recommending suit to vacate patent. Bullock v. C. P. R. R. Co., 11 L. D. 590.

299. If patent is secured under the placer mining laws for land not containing any placer deposits, for the purpose of securing title to the timber thereon, the United States may maintain a suit to vacate such patent for fraud in its procurement. United States v. Iron Silver M. Co., 128 U. S. 673. See S. C., 24 Fed. Rep. 568.

300. Suit to vacate a United States patent will be brought if the United States has an interest in the title. United States v. Minor, 114 U. S. 233; Mullan v. United States, 118 U. S. 271.

301. Suit to vacate a patent will be brought when the vacation is necessary to the protection of a third person whose rights the United States is bound to protect. Williams v. United States, 138 U. S. 573.

302. Where a patent has been obtained through fraud, and if allowed to stand would work prejudice to the rights of the United States, or prevent it from fulfilling an obligation, suit to vacate is warranted. United States v. Missouri, K. & T. Ry. Co., 141 U. S. 358.

303. A patent issued under the agricultural laws for land known to be mineral will be vacated on suit by the United States. United States v. Culver, 52 Fed. Rep. 81.

304. "If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course." Moore v. Robbins, 96 U. S. 530.

305. Suit to vacate a patent for fraud in its procurement will not be recommended by the Land Department where the land has passed into the hands of one not shown to have taken with notice of the fraud. William W. Wilson, 6 L. D. 395.

306. The United States may maintain a suit in equity to vacate a patent issued for a placer claim which was not placer land, but which was valuable for lodes and timber. United States v. Iron Silver M. Co., 5 McCrary, 266.

307. A corporation, some of the stockholders of which had exhausted their rights under the coal land laws, procured various persons individually qualified to make entry of coal lands for the purpose of transferring title acquired by such entry to the corporation. *Held*, that the transaction was in violation of the law governing the disposal of public lands containing coal, and that patents so obtained were voidable for fraud in their procurement. United States v. Trinidad Coal & Coking Co., 137 U. S. 160. (Reversing S. C., 37 Fed. Rep. 180.)

308. The United States may maintain a suit to vacate a patent issued by mistake, without showing that any third person has any right to the land patented. Germania Iron Co. v. United States, 19 U. S. App. 10.

309. Lands known to be valuable for coal are not subject to indemnity selection by the State of California for lands lost under its school land grant, and if a patent issues to the State for lands so known at date of issuance of patent, the United States may bring suit in equity to vacate the patent, though issued without fraud. Mullan v. United States, 118 U. S. 271. See S. C., 7 Sawy. 466; 10 Fed. Rep. 785. The representations must have been falsely and fraudulently made. A mistake as to the character of the land will not suffice. United States v. Iron Silver M. Co., 24 Fed. Rep. 568. See S. C., 128 U. S., 673.

310. It is not ground to set aside a patent that it should not have been issued to the patentee. The plaintiff must show a better right in himself. Sparks v. Pierce, 115 U. S. 408.

311. Where the United States brings a suit in equity to vacate a land patent for fraud in its procurement, it is not obliged to tender repayment of the purchase price paid for the land by the patentee. United States v. Trinidad Coal & Coking Co., 137 U. S. 160.

312. In order to secure the annulment of a patent for fraud, the fraud must be clearly proven. United States v. Stone, 2 Wall. 525; United States v. Throckmorton, 98 U. S. 61; Maxwell Land Grant Case, 121 U. S. 325; United States v. San Jacinto Tin M. Co., 125 U. S. 273; United States v. Iron Silver M. Co., 128 U. S. 673. (See S. C., 24 Fed. Rep. 568.) United States v. Budd, 144 U. S. 154.

313. The allegation that a patent was fraudulently obtained should state the facts. United States v. Tichenor, 12 Fed. Rep. 415.

314. Suit to vacate a patent will not be recommended by the Land Department on the ground of fraud, unless the showing thereof is clear and specific. Thomas Starr, 2 L. D. 759.

315. Proceedings to vacate a patent will only be recommended by the Land Department upon a clear showing that it was erroneously issued. James D. Negus, 11 L. D. 32.

316. Suit to vacate a patent for fraud in its procurement will not be recommended by the Land Department where the fraud is not clearly shown and the land has passed into the hands of a *bona fide* purchaser. G. T. Dickinson, 10 L. D. 449.

317. The United States will not attack its patent, regularly issued, for fraud in its procurement, unless such fraud is very clearly shown, especially where the land has passed into the hands of *bona fide* purchasers. Butte & Boston M. Co., 21 L. D. 125.

318. Suit will be recommended by the Land Department to vacate a patent procured by fraud where such action is necessary to protect the rights of a third person. Mountain Maid Lode, 5 L. D. 28.

319. The Land Department will recommend to the department of justice that suit be instituted to vacate a patent issued through inadvertence and mistake to the prejudice of another. Lead City Town Site v. Little Nell Lode, 17 L. D. 291.

320. If a patent is shown to have issued on false and fraudulent proof, the Land Department will recommend to the Attorney General that suit be instituted to vacate the same. Nicholas Abercrombie, 6 L. D. 393.

321. Suit to vacate should be recommended if patent was issued upon an incorrect survey. United States v. Rumsey, 22 L. D. 101.

322. The fact that lodes were known to exist within a placer claim at date of application for placer patent will not warrant recommendation of suit to vacate the placer patent where evidence of fraud is not clear, and the rights of *bona fide* purchasers have attached. The right of persons owning lodes within the placer at date of the application for placer patent are not injured by the issuance of the patent. Departmental decision of Sept. 21, 1893, *In re* Haskill v. Upton.

323. A petition asking the Secretary of the Interior to recommend suit to vacate a land patent will not be considered if not served upon the one claiming under the patent. Little Nell Lode, 16 L. D. 104.

324. A petition addressed to the General Land Office asking that suit be brought to vacate a patent should be forwarded to the Department with a recommendation as to the advisability of ordering a hearing preliminary to the recommendation of such suit. Butte & Boston M. Co., 21 L. D. 125.

325. A hearing to determine whether or not suit should be recommended to vacate a United States patent should be ordered only

by the Secretary of the Interior. Butte & Boston M. Co., 21 L. D. 125.

326. Where there are no adverse interests, the patent for a mine will not be disturbed notwithstanding irregularities in issuing it. Antelope Lode, 2 C. L. O. 2.

327. It is too late after patent has issued to object to the proof because it was not specific. Prince of Wales Lode, 2 C. L. O. 2.

328. Suit to vacate a patent will not be recommended by the Land Department where the matters made the basis of the petition therefor were fully considered and determined in favor of the claimant before the issuance of patent. Thomas Starr, 2 L. D. 759.

329. The failure of an applicant to comply with local regulations will not justify suit by the United States to vacate the patent issued to him. Such failure should be made the subject of an adverse claim or protest during the pendency of the application. Robert Hawke, 5 L. D. 131.

330. A stranger will not be heard to complain of the action of the government in issuing a land patent. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

331. Suit may be brought by the United States to vacate a patent fraudulently procured, and for an accounting for rents and profits. United States v. Pratt Coal & Coke Co., 18 Fed. Rep. 708.

22. *General.*

332. The stability of titles by patent is of the highest public importance. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Steel v. St. Louis Sm. Co., 106 U. S. 447; Sullivan v. Iron Silver M. Co., 109 U. S. 550; United States v. Maxwell Land Grant, 121 U. S. 379. See 3 Op. Atty. Gen. 420.

333. "A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is iron clad against all mere speculative inferences." Eureka Cons. M. Co. v. Richmond M. Co. (Eureka Case), 4 Sawy. 302; 9 Mor. Min. Rep. 578.

334. The policy of the law is to require all rights and equities in the premises sought to be purchased and patented to be adjusted prior to the issuance of patent, to the end that it may be impregnable against all comers. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; 420 M. Co. v. Bullion M. Co., 3 Sawy. 634; 9 Nev. 240; 11 Mor. Min. Rep. 608; Eureka Cons. M. Co. v. Richmond M. Co. (Eureka Case), 4 Sawy. 302; 9 Mor. Min. Rep. 578; Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178; Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77; 13 Colo. 174; 22 Pac. Rep. 436; Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

335. The doctrine of *res judicata* should be rigorously applied to the litigation brought to test the right to the issue of a patent. 420 M. Co. v. Bullion M. Co., 3 Sawy. 634; 9 Nev. 240; 11 Mor. Min. Rep. 608.

336. Courts should be slow in disturbing the title conveyed, and before they do they should be clearly satisfied that the applicant has intentionally concealed material facts, or made false and fraudulent representations. Questions of doubt should be resolved in favor of applicant. United States v. Iron Silver M. Co. (C. C.), 12 C. L. O. 163.

337. The procuring of patent to a mining claim by regular procedure is in the nature of a proceeding *in rem* as against the world. 420 Mining Co. v. Bullion M. Co., 3 Sawy. 634; 9 Nev. 240; 11 Mor. Min. Rep. 608.

338. The proceedings necessary to acquire a mineral patent are in the nature of a proceeding *in rem*, and are binding upon the world so far as concerns claims adverse to that of the applicant. Hamilton v. Southern Nevada G. & S. M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314.

339. Patent will not issue for a lode claim divided into two non-contiguous parts by a patented mill site, but may be issued for the tract on which are situate the discovery and improvements. Andromeda Lode, 13 L. D. 146.

340. A location which is separated along the line of the lode by a patented location made on a parallel lode is invalid as to one of the non-contiguous portions of the lode, as all parallel lodes embraced in the patented claim passed under the patent therefor. Col. Hall Lode (Keanage M. Griffin), 2 L. D. 735, 736.

341. Where lodes in their *general* directions are cross-lodes, one may be patented exclusive of the other, although in a part of the conflict of claims they may be parallel. Patten Extn. Lode, 15 L. D. 183.

342. No patent can issue for a vein or lode without surface ground. Wm. L. Campbell, 4 C. L. O. 102.

343. Section 2326, United States Revised Statutes, recognizes the patentability of portions of mining claims. Gustavus Hagland, 1 L. D. 593.

344. The final survey and patent must follow the application for patent. Prince of Wales Lode v. Highland Chief Lode, 2 C. L. O. 2.

345. Patent cannot issue for a mining claim any part of which is outside of the original location. Dyer v. Jackson, 6 C. L. O. 171.

346. The fact that a mining claim within an Indian reservation has been worked for several years gives the miner no right to a patent therefor. Com'r to A. B. Knight, Jan. 20, 1879, 5 C. L. O. 179.

347. Patent will not issue for a placer claim not shown to be valuable as such, and used only for the purpose of storing water for use on another placer claim. Robert S. Hale, 3 L. D. 536.

348. The fact that a placer patent was obtained with the intention of acquiring title to lodes supposed to exist within the placer claim, but as yet undiscovered, will not defeat the title of the placer patentee. Iron Silver M. Co. v. Reynolds, 124 U. S. 374; S. C., 116 U. S. 687; 15 Mor. Min. Rep. 591, first trial.

349. A placer patent carries title to the surface of the claim as well as to the land beneath the surface. Deffeback v. Hawke, 115 U. S. 392.

350. A patent for saline lands, which under the general laws were reserved, is void. Morton v. Nebraska, 21 Wall. 660; 12 Mor. Min. Rep. 451.

351. A patent for a mining claim located by the register of a local land office may issue to his grantee who took in good faith, and who has complied with the law. (No opinion expressed as to the legality of such a location.) Rust & Criteser, 2 L. D. 754.

352. Where a locator of a mining claim conveys the same with an agreement that he shall secure patent therefor in his own name, he may be allowed to make application and entry for the claim, notwithstanding his lack of title. A. P. Smith, 3 L. D. 340.

353. An entry may be passed to patent which was made by one claiming under a deed which was in fact a mortgage, where perfect legal title has since become vested in the entryman. White Extension West Lode, 23 L. D. 677.

354. A lode patent includes all veins having their tops or apexes within the surface patented. Iron Silver M. Co. v. Cheesman, 2 McCrary, 191; 9 Mor. Min. Rep. 552.

355. Section 9 of the act of 1866 (relative to water-rights) is not retroactive in its effect, and patents theretofore granted are not affected thereby. Said act merely recognized and confirmed rights held under local customs, laws and decisions. Union Mtn. M. Co. v. Ferris, 2 Sawy. 176; 8 Mor. Min. Rep. 90.

356. Mere appropriation of water confers no right against a subsequent patentee of the land whence the water comes. Van Sickle v. Haines, 7 Nev. 249; 15 Mor. Min. Rep. 201. (Overruled in Jones v. Adams, 19 Nev. 78.)

357. Patents for public land issue subject to vested rights of appropriators of water under local customs, statutes and decisions. Osgood v. Eldorado Co., 56 Cal. 571; 5 Mor. Min. Rep. 37; Barnes v. Sabron, 10 Nev. 217; 4 Mor. Min. Rep. 678.

358. The rights of persons owning mining ditches upon public lands are protected by section 2339, United States Revised Statutes. Patents are not issued for such ditches. Com'r to Binger Herman, Feb. 18, 1892.

359. A mineral patent issued after May 10, 1872, could not convey more than three hundred feet of surface on each side of the lode applied for, even though the location was made under a law which allowed more than that width of surface ground, and a patent issued subsequent to 1872, for a claim exceeding a width of three hundred feet on each side of the middle of the vein, is void as to the excess, and to that extent may be attacked collaterally. Lakin v. Dolly (S. C., as Lakin v. Roberts), 53 Fed. Rep. 333; 54 Fed. Rep. 461; 7 U. S. App. 539.

360. A patent to a fictitious person is not voidable but is absolutely void. Moffat v. United States, 112 U. S. 24; United States v. Southern Colorado Coal & Iron Co., 18 Fed. Rep. 273.

361. A patent issued subsequent to the act of May 10, 1872, may embrace a placer consisting of more than one hundred and sixty acres, and including as many adjoining locations as the patentee has purchased. The

proceedings to obtain a patent therefor are the same as when the claim covers but one location. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

362. There is no limitation to the number of locations one person may make or hold, nor to the number which may be embraced in one patent. Poire v. Wells, 6 Colo. 406.

363. "While the law prescribes a limitation to the size of a single location, there is no limitation to the number of claims one person may hold by purchase, or that may be enclosed in a single patent, and as I understand, that may be included in a single survey, showing only the exterior boundaries, and omitting all interior lines of the several smaller claims." Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597. (Citing Polk's Lessee v. Wendall, 9 Cranch, 87; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.)

364. One survey, application, entry and patent may embrace several contiguous claims held in common. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Good Return M. Co., 4 L. D. 221; Circular, Dec. 14, 1885, 4 L. D. 374; S. F. Mackie, 5 L. D. 199.

365. "The miner having located his claim, is to be treated as an express licensee of the United States and independent of a purchase from the government of his mining claim, he has, upon compliance with the terms of the act a right to appropriate the minerals therein contained. A title in fee by patent is offered him, which he may at his pleasure accept or reject." There is no time prescribed within which he shall apply for a patent. Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282; Chapman v. Toy Long, 4 Sawy. 28; 1 Mor. Min. Rep. 497; Lebanon M. Co. v. Cons. Republican Mtn. M. Co., 6 Colo. 381; Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

366. The fact that a part of a mining location on which were situate the improvements was, after location, patented to an agricultural claimant, does not render the location invalid, at least as to a subsequent locator not claiming under the agricultural patentee. Richards v. Wolfling, 98 Cal. 195; 32 Pac. Rep. 971.

367. Work done outside of the claim upon another patented claim, if for the benefit of the unpatented claim, may be considered as having been done upon it. Hall v. Kearney, 18 Colo. 505; 33 Pac. Rep. 373.

368. A deed of mineral entries Nos. 1 and 2, lots 3 and 4, patented as the A. and B. claims, may, if such appears to have been the intent of the parties, be held to convey all of grantor's title to the A. and B. claims, even though the patent only covered parts thereof. Crescent M. Co. v. Wasatch M. Co., 19 Pac. Rep. 198; Jackson v. Dines, 13 Colo. 90; 21 Pac. Rep. 918.

369. A person who makes improvements upon public land, knowing that he has no title, and that the land is open to exploration and sale for its minerals, and makes no effort to secure the title to it as such, under the laws of Congress, or a right of possession under the local customs and rules of miners, has no claim to compensation for his improvements as an adverse holder in good faith, when such sale is made to another, and the title is passed to him by a patent of the United States. Sparks v. Pierce, 115 U. S. 408.

370. It is too late after patent has issued to make objection that publication of notice was not in compliance with the act of July 26, 1866. Prince of Wales Lode, 2 C. L. O. 2.

371. A valid location must be so made that upon compliance with the law a patent might be issued, embracing the surface evidences of the location, excepting, perhaps, one or more boundary stakes. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.)

372. A party not an adverse claimant may appear any time before the issue of patent and show from the record that the mining applicant has no right to the premises. Tiernan v. Salt Lake M. Co., 1 C. L. O. 25.

373. A clerical error in the register's final certificate in a mineral entry in an owner's name does not affect the validity of a patent issued under the correct name. Prince of Wales Lode, 2 C. L. O. 2.

374. Dower interest in a mining claim, which attached while the claim was held under possessory title, may not be asserted against a patentee who was the assignee of the dower claimant's husband. Black v. Elkhorn M. Co., 52 Fed. Rep. 859.

375. An equitable title must yield to that which the patent conveys. United States v. Southern Colorado Co., 18 Fed. Rep. 273.

376. A lien given for work done on "mines" does not cover work in mining on a patented agricultural entry. Morse v. De-Adro, 40 Pac. Rep. 1019.

377. A mineral patent will issue only to a qualified applicant for patent or to one claiming under him by transfer before entry. J. C. Baker Fraction Placer, 28 L. D. 112.

ADVERSE CLAIMS.

I. THE STATUTES.
II. REGULATIONS.
III. DECISIONS.
1. *Verification.*
2. *Subject of.*
3. *Filing.*
4. *What Must be Shown.*
5. *Effect of.*
6. *Suit.*
7. *Judgment.*
8. *General.*

I. THE STATUTES.

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land-office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining-claim to any person whatever. (17 Stat. 93; 19 Stat. 52; sec. 2326, U. S. Rev. Stat.)

Act of March 3, 1881.

AN ACT to amend section twenty-three hundred and twenty-six of the Revised Statutes relating to suits at law affecting the title to mining-claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land-office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

Approved March 3, 1881. (21 Stat. 505.)

Act of April 26, 1882.

AN ACT to amend section twenty-three hundred and twenty-six of the Revised Statutes, in regard to mineral lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney-in-fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

Approved April 26, 1882. (22 Stat. 49.)

II. REGULATIONS.

81. Section 2326, and the act of April 26, 1882, provide for adverse claims, fix the time within which they shall be filed to have legal effect, and prescribe the manner of their adjustment, etc.

82. An adverse mining claim must be filed with the register and receiver of the Land Office where the application for patent was filed, or with the register and receiver of the district in which the land is situated at the

time of filing the adverse claim. It must be on the oath of the adverse claimant, or it may be verified by the oath of any duly authorized agent or attorney-in-fact of the adverse claimant, cognizant of the facts stated.

83. Where an agent or attorney-in-fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

84. The agent or attorney-in-fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

85. The adverse notice must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

86. In order that the "*boundaries*" and "*extent*" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict. This plat must be made from an actual survey by a United States deputy surveyor, who will officially certify thereon to its correctness; and in addition there must be attached to such plat of survey a certificate or sworn statement by the surveyor as to the approximate value of the labor performed or improvements made upon the claim by the adverse party or his predecessors in interest, and the plat must indicate the position of any shafts, tunnels, or other improvements, if any such exist, upon the claim of the party opposing the application, and by which party said improvements were made: *Provided, however*, That, if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat.

87. Upon the foregoing being filed within the sixty days as aforesaid, the register, or in his absence the receiver, will give notice in writing to *both parties* to the contest that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived, and the application for patent be allowed to proceed upon its merits.

88. When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notices and plat, and the filing of the necessary proof thereof, until the controversy shall have been adjudicated in court, or the adverse claim waived or withdrawn.

89. Where an adverse claim has been filed and suit thereon commenced within the statutory period, and final judgment determining the right of possession rendered in favor of the applicant, it will not be sufficient for him to file with the register a certificate of the clerk of the court, setting forth the facts as to such judgment, but he must, before he is allowed to make entry, file a certified copy of the judgment, together with the other evidence required by section 2326, Revised Statutes.

90. Where such suit has been dismissed, a certificate of the clerk of the court to that effect, or a certified copy of the order of dismissal, will be sufficient.

91. In no case will a relinquishment of the ground in controversy, or other proof, filed with the register or receiver, be accepted in lieu of the evidence required.

92. Where an adverse claim has been filed, but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the State court having jurisdiction in the case, and also by the clerk of the circuit court of the United States for the district in which the claim is situated, will be required.

104. The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, R. S., paragraph 9.)

105. All fees or charges under this law may be paid in United States currency.

III. Decisions.

1. *Verification.*

1. An adverse must be upon oath of the adverse claimant. Samuel McMaster, 2 L. D. 706.

2. An adverse by several parties need be verified by one only. Jenny Lind M. Co. v. Eureka M. Co., Sickel's Min. Dec. 223–231.

3. An adverse sworn to before an officer outside of the land district, but whose jurisdiction extends into the land district, and who acted within his jurisdiction, held good. Corning

T. M. & R. Co. v. Pell, Sickel's Min. Dec. 307; 3 C. L. O. 195.

4. A commissioner of deeds for Nevada, residing in California, is not an officer before whom an adverse claimant to a mine in Nevada may make oath. (Rendered prior to act of 1882.) Dardanelles M. Co. v. California M. Co., Sickel's Min. Dec. 326; Corning M. & Red. Co. v. Pell, 3 C. L. O. 195.

5. An agent who files an adverse claim must show his authority and swear to the adverse claim within the land district wherein the claim is situated. Circular of May 9, 1882, 1 L. D. 685.

6. An adverse by corporation may be verified under oath of its president, other proper officer or duly authorized agent. Hawley Cons. M. Co. v. Memnon M. Co., Sickel's Min. Dec. 235; Equator M. & Sm. Co. v. Marshall S. M. Co., 1 C. L. O. 132.

7. Where the attorney of an incorporated company signs the adverse claim in the usual form as "general manager and attorney in fact," and verifies the same before a notary public, and swears that the company is duly incorporated, further evidence of incorporation and power to hold real estate is not required. Philadelphia M. Co. v. Finley, 10 C. L. O. 340.

8. Failure of an agent who files an adverse claim, sworn to as agent, and on which suit is duly instituted, to furnish proof of agency at time of filing the adverse claim, will not warrant the allowance of entry upon the application against which the adverse claim is filed, and an entry so allowed will be canceled. Brown v. Bond, 11 L. D. 150.

2. *Subject of.*

9. An agricultural claim may be the subject of an adverse claim. Anderson v. Amador & Sacramento Canal Co., 10 L. D. 572. *Contra*, Com'r to Rapid City Office, April 13, 1889; Com'r to Lake City Office, Dec. 1, 1880.

10. Delinquent co-tenants must protect their rights by adverse. Grampian Lode, 1 L. D. 544; Lucy B. Hussey Lode, 5 L. D. 93; Monitor Lode, 18 L. D. 358; Gold Dirt Lode, 10 C. L. O. 119; J. Q. S. Lode, 10 C. L. O. 206; Mattingly v. Lewisohn, 8 Mont. 259; 19 Pac. Rep. 310.

11. *Contra:* A co-owner need not protect his rights by adverse if application for patent is made in their own names by the other co-owners; but if patent issues to them, they will be declared constructive trustees for the owner whose name is omitted from the application. Brundy v. Mayfield, 15 Mont. 201; 38 Pac. Rep. 1067; Turner v. Sawyer, 150 U. S. 578.

12. A tenant in common of a mining claim, holding under possessory title, is not bound to file an adverse claim against an application for patent to the claim filed by a co-owner. The statute contemplates the filing of an adverse by one setting up a title *against* the mining claim applied for, not by one claiming an interest in the claim. Turner v. Sawyer, 150 U. S. 578.

13. An adverse claim under section 2326, United States Revised Statutes, need not be filed by co-owner if application for patent is made by another co-owner. Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816.

14. A co-owner of a mining claim who is not joined with the other owners must, to be recognized by the Land Department, protect his rights by filing an adverse claim under section 2326, United States Revised Statutes. Grampian Lode, 1 L. D. 544.

15. Where an applicant bases his right to a patent on a relocation, in the making of which he acted as a constructive trustee for the benefit of co-owners according to their respective interests in the original location, such co-owners are not obliged to adverse the application, but may have the applicant declared trustee. Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816.

16. The regularity and legality of forfeiture proceedings against alleged delinquent co-owners, under section 2324, United States Revised Statutes, will not be questioned by the Land Department if such co-owners fail to protect their rights under section 2326, United States Revised Statutes. Grampian Lode, 1 L. D. 544.

17. Dower interest in a mining location must be protected by an adverse claim under section 2326, United States Revised Statutes, as the possessory title, which is subject to dower, merges in the absolute fee-simple title on issuance of patent. Black v. Elkhorn M. Co., 49 Fed. Rep. 549.

18. A claimant under a Mexican grant must protect his rights by filing an adverse claim and instituting suit thereon. If he

fails so to do he can appear only as a protestant, and as such has no right of appeal from a decision of the General Land Office dismissing his protest. McGarrahan v. New Idria M. Co., 3 L. D. 422.

19. The right to follow a lode on its dip is not the proper basis of an adverse claim. Chollar Potosi M. Co. v. Julia G. & S. M. Co., Sickel's Min. Dec. 254.

20. An easement is not the subject of an adverse claim. Rockwell v. Graham, 9 Colo. 36; 10 Pac. Rep. 284; 15 Mor. Min. Rep. 299; Com'r, Dec. 29, 1871, Sickel's Min. Dec. 245.

21. Right of way for a flume is protected, if at all, by section 2339, United States Revised Statutes, and is not properly a basis for an adverse claim under section 2326, United States Revised Statutes. Rockwell v. Graham, 9 Colo. 36; 10 Pac. Rep. 284; 15 Mor. Min. Rep. 299.

22. A prior locator need not adverse to secure his rights to the vein at point of intersection; but by failure to adverse he loses surface rights. When two veins join on the strike, there must be surface conflict. Hence, rules as to surface conflicts apply as to conflict between lodes. Lee v. Stahl, 13 Colo. 174; 22 Pac. Rep. 436. (Affirming S. C., 9 Colo. 406; 11 Pac. Rep. 77.) Morgenson v. Middlesex M. & M. Co., 11 Colo. 176; 17 Pac. Rep. 513.

23. A. and B. are cross-lodes, A. being the prior location. B. applies for patent. By failing to adverse, A. loses his right to surface conflict and to the lode at point of intersection, but does not lose the remainder of his lode. A. has right of way through to work his lode. Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77. (Reaffirmed, 13 Colo. 174; 22 Pac. Rep. 436.) Branagan v. Dulaney, 8 Colo. 408; 8 Pac. Rep. 669. *Contra*, Watervale M. Co. v. Leach, 33 Pac. Rep. 418 (Arizona).

24. The locator who has a vein extending through his claim owns all other veins whose apexes are within his claim, and may adverse an application for a conflicting claim located on one of such other veins. Freeland v. Hoffman, 13 Mor. Min. Rep. 289.

25. A mill site claim must be protected by an adverse. Warren Mill Site v. Copper Prince Lode, 1 L. D. 555; Shafer v. Constans, 3 Mont. 369; 1 Mor. Min. Rep. 147.

26. A duly qualified corporation may locate a mill site under the provisions of section 2337 of the United States Revised Statutes and maintain an adverse claim in defense of its claim. Bay State Gold M. Co. v. Trevillion, 10 L. D. 194.

27. A public highway is not a proper basis of an adverse claim, being only an easement. Com'r, Dec. 29, 1871.

28. The owner of a lode claim covered by an application for a placer patent is not obliged to adverse the placer application, for his claim is excepted from the operation of the placer patent by law. Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

29. A lode claimant who fails to adverse the application for patent to a placer claim covering his location is barred from thereafter claiming more than twenty-five feet on each side of his lode. Shonbar Lode, 1 L. D. 551; 3 L. D. 388. See South Star Lode, 20 L. D. 204.

30. A placer claimant may file an adverse against the application for patent to a lode claim conflicting with the placer claim. Bennett v. Harkrader, 158 U. S. 441.

31. Town site claimants should protect any rights they may have adverse to that of a mineral applicant by filing an adverse claim and proceeding thereon in court. Thomas Starr, 2 L. D. 759.

32. When application for patent is made for a lode claim embraced within a patented town site, the town site claimants should protect any rights they may have by filing an adverse claim and securing a judicial determination thereof. If they fail so to do the United States will not bring suit to vacate the lode patent. Smoke House Lode, Butte City, 4 L. D. 555.

33. A town lot owner must adverse a mineral application. Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Papina v. Alderson, 10 C. L. O. 52.

34. Rights between town site and mineral claimants are determined by the courts. Rico Town Site, 1 L. D. 556; Becker v. Central City Town Site, Sickel's Min. Dec. 302.

35. Town sites may be located on mineral lands, the rights of mining claimants being protected by statutory reservations thereof inserted in a town site patent (secs. 2386 and 2392, U. S. Rev. Stats.). Relative rights of mining claimants and of town site claimants are to be decided by the courts. Esler v. Town Site of Cooke, 4 L. D. 212.

36. A prior mining location is not affected by a town site entry. The mining claimant need not file an adverse claim. Butte City Smokehouse Cases, 6 Mont. 397; 12 Pac. Rep. 858; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 484.

37. Where prior to application for patent the owner of a mining claim conveys a part thereof as a town lot, the grantee is not bound to adverse the application, but the patentee takes title subject to a trust in favor of his grantee. Suessenbach v. First National Bank, 5 Dak. 447; 41 N. W. Rep. 662.

38. A tunnel claimant need not adverse a lode applicant whose claim lies within fifteen hundred feet of the line of the tunnel, where there is no apparent conflict of rights, and is not estopped by failure so to adverse from claiming fifteen hundred feet along any lodes subsequently discovered in his tunnel. Enterprise M. Co. v. Rico Aspen Cons. M. Co., 66 Fed. Rep. 200. (Refuses to follow Corning Tunnel & M. Co. v. Pell, 4 Colo. 507; 14 Mor. Min. Rep. 612.) Hope Mining Co. v. Brown, 7 Mont. 550; 19 Pac. Rep. 218.

39. A tunnel claimant has no cause for adversing a lode claimant who has made a discovery outside of the line of tunnel, and whose location lies across the line of tunnel, unless the lode has been discovered in said tunnel. Hope M. Co. v. Brown, 7 Mont. 550; 19 Pac. Rep. 218. (Overrules Hope M. Co. v. Brown (*supra*), 11 Mont. 370; 28 Pac. Rep. 732, wherein it is held that patent proceedings by lode claimant will be suspended until development of lode in tunnel or abandonment of tunnel right (and, *semble*, the lode claimant will be restrained from taking ore from the line of tunnel). Corning Tunnel, etc. Co. v. Pell, 4 Colo. 507; 14 Mor. Min. Rep. 612, not followed.)

40. A tunnel claim under section 2323, United States Revised Statutes, is a mining claim, and must be protected by filing of an adverse claim if application for patent to a claim in conflict therewith is filed. A failure to file an adverse claim is a waiver of all rights under the tunnel claim adverse to those of the applicant for patent. Bodie Tunnel & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584; Broder v. Natoma Water & M. Co., 101 U. S. 274.

41. A tunnel location must be protected by adverse. Bodie Tunnel & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584; Back v. Sierra Nevada Cons. M. Co., 2 Idaho, 386; 17 Pac. Rep. 83; Tioga Cons. M. Co., 8 C. L. O. 88.

42. A surface conflict is a necessary basis of an adverse claim. Smuggler M. Co. v. Trueworthy Lode, 19 L. D. 356; Com'r to Leadville Office, Feb. 28, 1880; New York Hill Co. v. Rocky Bar Co., 6 L. D. 318; Eureka M. Co. v. Pioneer Cons. M. Co., 8 C. L. O. 106.

43. Under section 2326, United States Revised Statutes, an adverse claim must be against the claim of the applicant, not based on an equitable right in the claim. Doherty v. Morris, 11 Colo. 12; 16 Pac. Rep. 911.

44. Possession held by a tenant of the adverse claimant is a proper basis of an adverse claim. Wolverton v. Nichols, 119 U. S. 485; 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309.

45. Where a mining claim has been sold on execution and thereafter application is filed by the judgment debtor, who gives due notice thereof, the claim of the vendee is adverse to that of the applicant and must be protected by adverse proceedings under section 2326, United States Revised States, or be considered waived. Hamilton v. Southern Nevada G. & S. M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314.

46. Assessment work is not done on a claim, though one owner promises to see that it is done. A third person, in collusion with the owner by whose fault abandonment occurred, relocates and applies for patent. The other owner in the original location adverses. *Held*, that he has no grounds for adversing, but should file a bill in equity against the applicant to have him declared trustee. Doherty v. Morris, 11 Colo. 12; 16 Pac. Rep. 911.

47. The failure of an applicant to comply with local regulations will not justify suit by the United States to vacate the patent issued to him. Such failure should be made the subject of an adverse claim or protest during the pendency of the application. Robert Hawke, 5 L. D. 131.

48. Irregularity of location must be shown in an adverse proceeding. Little Pauline Lode v. Leadville Lode, 7 L. D. 506.

49. All questions concerning the proper location and maintenance of a prior location, and performance of labor, must be left to the courts. Branagan v. Dulaney, 2 L. D. 749.

50. Any state of facts which shows that the person alleging the same has a better right to the premises than the applicant is

the proper subject of an adverse claim. Mono M. Co. v. Magnolia E. & W. Co., Sickel's Min. Dec. 198, 2 C. L. O. 68.

51. The allegation by a protestant that the location of a mining claim applied for was invalid because in conflict with the prior location of the protestant is simply the allegation of an adverse claim, which may be tried only in the manner prescribed by section 2336, United States Revised Statutes, in a court of competent jurisdiction. Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584.

52. Any rights adverse to a mineral application must be protected by an adverse claim under section 2326, United States Revised Statutes. Omaha & Grant Sm. & Red. Co. v. Tabor, 13 Colo. 41; 21 Pac. Rep. 925; Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77. (Affirmed, 13 Colo. 174; 22 Pac. Rep. 436.)

53. Conflicting claims must be protected under section 2326, United States Revised Statutes, not by second application. Com'r to Montgomery Blair, Sept. 27, 1880, Sickel's Min. Dec. 243.

54. A court must determine all questions incidental to possession. Southwestern M. Co. v. Gettysburg Lode, 4 L. D. 273.

55. Application having been filed, applicant need not adverse a subsequent applicant. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292; Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 114 U. S. 576; 2 Colo. Law Rep. 7; Crown Point Lode, Sickel's Min. Dec. 116; id. 243; id. 275.

56. Where adverse proceedings are pending against an application for patent, the adverse claimant is not required to adverse a second application for the same land, filed by the same applicant. Rose v. Richmond M. Co., 17 Nev. 25; 2 Colo. Law Rep. 7; 27 Pac. Rep. 1105; 114 U. S. 576.

57. Where a patent erroneously described ground claimed, the patentees or their assigns are entitled to file an adverse against a subsequent application for same ground. Haseltine v. Reynolds, Sickel's Min. Dec. 311.

58. A claimant under act of 1866 need not adverse an application for another lode, though the apex of his lode is covered by the claim applied for, by reason of the fact that the act of May 10, 1872, protects adverse rights existing prior to that date. Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304.

59. As claims located prior to 1872 were for one vein only, an application for a claim in conflict with another need not be adversed by the owner of such other claim to protect his rights, if such claims were located on different lodes. Blake v. Butte S. M. Co., 2 Utah, 54; 9 Mor. Min. Rep. 503.

60. A prior patentee need not adverse a subsequent application. Mantle v. Noyes, 5 Mont. 274; 5 Pac. Rep. 856; S. C., 127 U. S. 348.

61. It is unnecessary to file an adverse claim based upon a pretended lode, as all the area in conflict with a prior patent is excluded before issuance of a second patent. Com'r, June 11, 1881, McCauley Placer.

62. Where an application for patent under the lode mining laws is made for land already patented to another under the placer mining laws, the provisions of section 2326, United States Revised Statutes, do not require the placer patentee to adverse the application of the lode claim, as only those holding mining claims by possessory title are required to proceed under that law. Iron Silver M. Co. v. Campbell, 135 U. S. 286.

63. A protest setting up only matters which might and should have been tried on an adverse suit, filed after the allowance of entry, will be dismissed. Warren Mill Site v. Copper Prince Lode, 1 L. D. 555.

64. The owner of a lode alleged to have been known at date of application for patent to a placer (patented) covering the lode should apply for patent in the usual manner and allow the placer patentee to adverse should he desire. Olathe Placer, 4 L. D. 494.

3. *Filing.*

65. An adverse claim must be asserted within the legal period of publication. Snow Flake Lode, 4 L. D. 30.

66. An adverse claim should not be received if not filed until after the expiration of the sixty days of publication. Nettie Lode v. Texas Lode, 14 L. D. 180.

67. To be considered, an adverse claim must be filed within the period of publication of notice (sixty days). Tiernan v. Salt Lake M. Co., 1 C. L. O. 25; Equator M. & Sm. Co., 2 C. L. O. 114.

68. An adverse claim filed one day, and on the following day withdrawn and refiled, will be considered, within the meaning of the law, to have been filed upon the latter day. Sprucemont Co. v. Lewis, Sickel's Min. Dec. 214; 4 C. L. O. 114.

69. If an adverse claim is not filed during the sixty days of publication, it is presumed there is no adverse, the agreement of parties to the contrary notwithstanding. Gustavus Hagland, 1 L. D. 591; Lincoln Lode, Sickel's Min. Dec. 208.

70. Though publication of notice of a mineral application in a weekly newspaper must cover sixty-three days, an adverse claim must be filed during the first sixty days thereof. Miner v. Mariott, 2 L. D. 709; Nettie Lode v. Texas Lode, 14 L. D. 180; Ledger Lode, 16 L. D. 101.

71. In computing the sixty days of publication within which an adverse claim must be filed against a mineral application, the first day of publication is to be excluded. Bonesell v. McNider, 13 L. D. 286; Waterhouse v. Scott, 13 L. D. 718; Ledger Lode, 16 L. D. 101.

72. The period of publication within which adverse claims must be filed ceases to run against adverse claimants if the posting of the notice in the land office is not continuous. Tilden v. Intervenor M. Co., 1 L. D. 572.

73. The time within which an adverse claim must be filed ceases to run while the local land office is closed. Tilden v. Intervenor M. Co., 1 L. D. 572.

74. If the sixtieth day of publication falls on a holiday, an adverse claim may be filed on the next business day. Satter v. Burt, 20 Wend. 205; Ground Hog Lode v. Parole & Morning Star Lodes, 8 L. D. 430; Waterhouse v. Scott, 13 L. D. 718.

75. The time within which an adverse claim must be filed does not begin to run until posting is made on the claim and in the local land office. Great Western Lode, 5 L. D. 510.

76. The fact that proof of publication of notice of application for patent is not on file in the local land office will not warrant the local land officers in rejecting an adverse claim. Waterhouse v. Scott, 13 L. D. 718.

77. An adverse claim filed in time according to then existing Departmental rules, on the sixty-first day of publication, will be held valid. Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391.

78. The local land officers are not compelled to receive adverse claims or file them outside of the regular office hours; but if they are received and filed, and the suit is commenced within the time allowed by law, all action must be stayed. Sayer v. Hoosac Cons. G. & S. M. Co., 6 C. L. O. 73.

79. An adverse claim may be filed on Sunday or out of office hours if the local officers are willing to receive it. Sayer v. Hoosac Cons. G. & S. M. Co., 6 C. L. O. 73.

80. An adverse filed by the receiver on Sunday, the last day of publication, was filed within the legal period, and entitled the adverse claimant to stay of proceedings. Dolly Varden Lode, Sickel's Min. Dec. 301.

81. Filing of an adverse claim with the Register at his home is a filing with the Register and Receiver. Jennie Lind M. Co. v. Eureka M. Co., Sickels, Min. Dec. 223, 231.

82. An adverse claim filed out of time operates as a protest only. Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584; McGarrahan v. New Idria M. Co., 3 L. D. 422; Nettie Lode v. Texas Lode, 14 L. D. 180.

83. The papers in an adverse claim once filed cannot be withdrawn, but become part of the record. Jefferson M. Co. v. Pennsylvania M. Co., 1 C. L. O. 66.

84. A misstatement in the published notice of the date of the expiration of publication is no excuse for failure to file an adverse claim in time. Bonesell v. McNider, 13 L. D. 286; Nettie Lode v. Texas Lode, 14 L. D. 180.

85. Publication of notice of application for a mineral patent in a weekly paper requires ten insertions; but where only nine were made in accordance with the former practice of the Land Department, the entry may be referred to the Board of Equitable Adjudication for confirmation, in the absence of any adverse rights. Oro Placer, 11 L. D. 457.

86. Applicants for patent cannot extend or abridge the period of publication by stipulation or otherwise, so as to extend or limit the time within which an adverse may be filed. Com'r to Leadville Office, Sept. 19, 1879, 6 C. L. O. 105.

87. "The proceedings before the Land Department [under mineral law] are judicial in character, and the publication of notice as

required brings all parties into court; and if they stand by and allow the statutory time for filing adverse claims, or for bringing suit in support thereof, to elapse, their rights, so far as they might have been determined in such proceedings, in absence of fraud or mistake, . . . are lost." Kannaugh v. Quartette M. Co., 16 Colo. 341; 27 Pac. Rep. 245; Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77. (Reaffirmed, 13 Colo. 174; 22 Pac. Rep. 436.) Hunt v. Eureka Gulch M. Co., 14 Colo. 451; 24 Pac. Rep. 550; Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Wight v. Dubois, 21 Fed. Rep. 693.

88. Publication of notice of application for mineral patent under the direction of the Receiver of the Land Office, during a vacancy in the office of Register, is the act of a *de facto* officer and is not invalid, and failure to adverse such application during such publication is a waiver of adverse rights. Jeffords v. Hine, 11 Pac. Rep. 351; 15 Mor. Min. Rep. 575.

89. A. and B. claim the same vein under conflicting locations. A verbal agreement is made that A. should obtain patent and convey a one-half interest to B., expenses to be borne equally. On suit to compel specific performance, it was held that the agreement was within the Statute of Frauds; that relinquishing a disputed possession and simply refraining from filing an adverse claim did not constitute a part-performance such as would take the agreement out of the statute, and that even a part-payment of expenses of securing patent could not avail plaintiff, for the reason that there was no such mutuality of obligation in the agreement as would have enabled the defendant to compel such payment had the plaintiff seen fit to refuse it. Ducie v. Ford, 8 Mont. 238; 138 U. S. 587.

90. The statutory fee demandable by the local land officers for filing of an adverse claim may not be demanded unless the adverse claim is received and filed. Waterhouse v. Scott, 13 L. D. 718.

91. An adverse claim may not be received until the fees therefor are paid. If offered for filing in time, but the fees are not paid until after publication, the adverse claim will be considered as a protest only. Foley v. Omaha G. M. Co., 3 C. L. O. 36.

92. An incorporated company may file an adverse claim through its agent. Com'r to Central City Office, Oct. 26, 1874.

93. Where the agent of an incorporated company signs the adverse in the usual form as "general manager, agent, and attorney in fact," and verifies the same before a notary public, and swears that the company is duly incorporated, further evidence of incorporation and power to hold real estate is not required. Philadelphia M. Co. v. Finley, 10 C. L. O. 340.

94. An allegation of the official character of the president of the corporation in the adverse claim is sufficient. Jennie Lind M. Co. v. Eureka M. Co., Sickel's Min. Dec. 228, 231.

95. An adverse claim may be filed on behalf of a company by the general superintendent, as an executive officer thereof, without specific authority to do so. Com'r, July 12, 1882, Della S. Lode v. American Lode.

96. By circular of May 9, 1882, Act April 6, 1882 (22 Stat. 49), an adverse claim must be made by claimant or duly authorized agent. Proof of agency is necessary if adverse is filed by an agent. Instructions, 1 L. D. 685.

97. An adverse claim may be filed by claimant's duly authorized agent or attorney in fact. Circular of May 9, 1882, 9 C. L. O. 52.

98. Failure of an agent who files an adverse claim to furnish therewith proof corroborating his sworn statement of authority will not invalidate the adverse where suit has been commenced thereon. Brown v. Bond, 11 L. D. 150.

99. Failure of a prior locator to adverse the application for patent by a subsequent locator operates under the law as a waiver of priority of right. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Warren Mill Site v. Copper Prince Lode, 1 L. D. 555; Gustavus Hagland, 1 L. D. 591; Chapman v. Toy Long, 4 Sawy. 28; 1 Mor. Min. Rep. 497; Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 9 Mor. Min. Rep. 578; Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; 114 U. S. 576; Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

100. Failure to adverse a mineral application for patent is a waiver of all claims to the ground adverse to those of the applicant, and the fact that such adverse claims are based on the same locations as those of the applicant does not vary the rule. Nichols v. Becker, 11 L. D. 8.

101. Failure to adverse an application for a conflicting claim is a waiver of all rights adverse to the applicant. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

102. Where an adverse claim is not filed during the period of publication, all matters that might have been adjudicated thereby are considered as settled in favor of the applicant. Snow Flake Lode, 4 L. D. 30; Petit v. Buffalo G. & S. M. Co., 9 L. D. 563.

103. If no adverse claim is filed during the period of publication, it is assumed that the applicant is entitled to a patent, and no agreement of parties can control this statutory provision. (Following Gustavus Hagland, 1 L. D. 591.) Independence Lode, 9 L. D. 571.

104. Failure of a prior locator to adverse the application of a subsequent locator of a conflicting claim is a waiver of his priority. Gustavus Hagland, 1 L. D. 591.

105. Failure to adverse an application for patent is a waiver of any rights adverse or superior to those of the applicant. Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240.

106. Failure to file an adverse within the time allowed by law is an admission that the adverse claimant has no right of property. He cannot be heard subsequently to claim either legal or equitable title. Wight v. Tabor, 2 L. D. 738.

107. One who has filed an application for a mining patent, but who has given no notice thereof, is bound to adverse the application of another who makes a subsequent application and gives notice thereof, and the failure so to do is a waiver of his rights. Snow Flake Lode, 4 L. D. 30.

108. One who has made an application for patent (and given notice thereof) is not required to adverse a subsequent application for a conflicting claim. Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; 114 U. S. 576; Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

109. Where the original discovery shaft of a mining location is included within a subsequent location as patented, on the failure of the first locator to commence adverse proceedings within the time required, or to set up a new discovery stake at a new discovery shaft on unappropriated ground, he loses all rights under the prior location, not only as against the patentee but also as against subsequent locators. Girard v. Carson, 44 Pac. Rep. 508 (Colo.).

110. By failing to adverse the application of a junior locator of a cross-lode, the senior locator loses his lode at point of intersection of the two veins, but not his right to the remainder of his lode within the conflict between the two claims. Branagan v. Dulaney, 8 Colo. 408; 8 Pac. Rep. 669; Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77. (Affirmed, 13 Colo. 174; 22 Pac. Rep. 436.)

111. A protestant against a mineral entry who failed to file an adverse claim and who does not allege non-compliance with the law on the part of the entryman is not entitled to appeal from the decision of the General Land Office dismissing his protest. Cedar Hill M. Co. v. Jacob Little Cons. M. Co., 1 L. D. 628.

112. The failure of one alleging an adverse interest to file an adverse claim does not estop him from appearing as a protestant to secure cancellation of the entry for non-compliance with law. Nevada Lode, 16 L. D. 532.

113. Failure of a prior locator to adverse the application for patent to a junior conflicting location is not a waiver of priority and of right to object to issuance of such patent. Whitman v. Haltenhoff, 19 L. D. 245.

114. After the allowance of entry one who has failed to file an adverse claim will not be heard to attack the validity of the location of the claim entered, because of his own prior location, as he should have asserted his rights in the manner prescribed by section 2326, United States Revised Statutes. Warren Mill Site v. Copper Prince Lode, 1 L. D. 555.

115. As the adverse claim was not filed in time, and the proof of the claimant is satisfactory, the protest is dismissed. John McNeill, 17 C. L. O. 41.

116. Where the evidence submitted by an applicant for a placer patent shows the land applied for to be placer mining land, the character of the land cannot be questioned by one asserting an adverse claim who has not proceeded as directed by section 2326, United States Revised Statutes. Dahl v. Raunheim, 132 U. S. 260.

117. One who files no adverse claim will not be allowed to question the legality of applicant's title. Lee v. Stahl, 9 Colo. 208; 11

Pac. Rep. 77. (Affirmed, 13 Colo. 174; 22 Pac. Rep. 436.) Hunt v. Eureka Gulch M. Co., 14 Colo., 451; 24 Pac. Rep. 550; Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Wight v. Dubois, 21 Fed. Rep. 693.

118. An allegation by a protestant that the location of the claim entered was void because of its conflict with his prior location will not be considered, as he should have protected his right by filing an adverse claim. Gowdy v. Kismet G. M. Co., 22 L. D. 624.

119. Adverse claimants who fail to file or to commence suit within the proper time will be treated as protestants, but cannot appeal. Juniper Mine, 4 C. L. O. 114.

120. Where parties fail to file adverse claims within the legal period they cannot be recognized as parties in interest, and are not entitled to the right of appeal. Camp Bird Case, Sickel's Min. Dec. 246; Kemp v. Starr, 6 C. L. O. 3.

121. A discovery of a vein or lode of mineral-bearing rock in place is a prerequisite to a valid location, and failure to make such discovery may be set up before the Land Department by one who has failed to file an adverse claim. Waterloo M. Co. v. Doe, 17 L. D. 111.

122. Where, in the location certificate of a mining claim of which entry has been made, it is stated that the location is upon an abandoned claim, the entryman is not required to furnish evidence of such abandonment, as the owner of the claim alleged to be abandoned loses his rights by failure to file an adverse claim. Manhattan & San Juan S. M. Co., 2 L. D. 698.

123. A tunnel claimant who does not file an adverse claim is a protestant. Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584.

124. An agricultural claimant who does not contest an application for a mineral patent is not entitled, as of right, to a hearing to determine the character of the land. Anderson v. Amador, etc. Canal Co., 10 L. D. 572.

125. The provisions of section 2326, United States Revised Statutes, relative to the filing of adverse claims, do not refer to the settlement, by means of an adverse claim and suit thereon, of controversies between agricultural and mineral claimants. Powell v. Ferguson, 23 L. D. 173.

4. *What Must be Shown.*

126. Unless the nature, boundaries and extent of the adverse claim are shown, an adverse claim must be dismissed. Robinson v. Mayger, 9 C. L. O. 5; Secretary, Nov. 12, 1881, *In re* Stroever v. Chamberlain.

127. The conflict forming the basis of the adverse claim must be actually surveyed by a United States Deputy Mineral Surveyor (Com'r to Prescott Office, July 17, 1873); and a diagram or plat made from a survey by another will not be accepted. Com'r to Salt Lake City Office, May 1, 1873; Jackson v. Tigèr S. M. Co., Sickel's Min. Dec. 263; Bates v. Chambers, 1 C. L. O. 98; Sickel's Min. Dec. 265.

128. A plat of an adverse claim made by one not a United States Deputy Mineral Surveyor is not good; but if such a plat be filed, and after the period of publication an official plat is tendered, it may be filed *nunc pro tunc*. Reno v. Old Kentucky G. M. Co., Com'r to Durango Office, Jan. 20, 1896.

129. The nature and extent of an adverse claim may be shown by an unofficial survey, if it is impracticable to obtain an official survey by a United States Deputy Mineral Surveyor. Hoffman v. Beecher, 31 Pac. Rep. 92.

130. Conflict shown by a platting thereof from the location notice, on applicant's plat, by a United States Deputy Mineral Surveyor, permitted where a survey is impossible. Philadelphia M. Co. v. Finley, 10 C. L. O. 340.

131. An adverse claimant is not permitted to color a portion of the applicant's survey and treat it as his entire claim. Bates v. Chambers, 1 C. L. O. 98; Sickel's Min. Dec. 265.

132. If it is impossible to make a survey to show the boundaries of an adverse claim, its absence may be waived if the conflict is shown as nearly as practicable from information available. J. S. Wallace, 1 L. D. 582.

133. Failure to file a plat showing adverse conflict may be excused when adverse claimant has been obstructed by applicant. Jennie Lind M. Co. v. Eureka M. Co., Sickel's Min. Dec. 223, 231.

134. The extent and nature of the adverse claim must be shown by the best means practicable, showing on oath the reasons for non-compliance with the regulations. Secretary, Nov. 24, 1873 (obstruction by applicant

of survey to show conflict); J. S. Wallace, 1 L. D. 582; Com'r to Harrison Office, Feb. 27, 1892.

135. An adverse claimant should not be required to describe his claim with more particularity than is the applicant for patent. Where a placer claim embraces and is described by legal subdivisions, the adverse claimant should not be required to furnish a plat and certificate of a Deputy Mineral Surveyor. Notwithstanding the adverse claimant did not furnish a certified copy of his location notice within the period of applicant's publication of notice, he is allowed to commence proceedings in court. Dieckman v. Good Return M. Co., 14 C. L. O. 237.

136. A survey on an adverse claim, containing slight errors, will not invalidate the adverse. Hoffman v. Beecher, 31 Pac. Rep. 92.

137. An allegation of an adverse claim upon a proper map is good, and if sufficient as a basis for court proceedings, the Land Department should await the judgment. Robinson v. Mayger, 1 L. D. 538.

138. The nature, extent and boundaries being properly set forth, the adverse will not be dismissed. Stewart M. Co. v. Wooster, 7 C. L. O. 51.

139. Such action as gives notice to the local officers of an adverse claim, and clearly defines the nature and extent thereof, is entitled to consideration. Sierra Nevada S. M. Co. v. Union Cons. S. M. Co., Sickel's Min. Dec. 202.

140. Where an adverse has been received and fees taken, it will not be dismissed because the plat and affidavit were not filed during publication of notice of application for patent. Secretary, July 22, 1892, Orient *et al.* Lodes.

141. An adverse claim which alleges no surface conflict of claims will not be received as such, as the relative rights of the parties to work a lode on its dip must be determined by the courts. New York Hill Co. v. Rocky Bar Co., 6 L. D. 318.

142. Only a surface conflict is the proper subject of an adverse claim. Robinson v. Mayger, 9 C. L. O. 5; Smuggler M. Co. v. Trueworthy Lode, 19 L. D. 356.

143. Adverse claimants must file an abstract of title. Com'r to Central City Office, March 4, 1872.

144. If adverse claimants properly allege ownership of the claim, that is good pleading, and sufficient to notify the applicant what is claimed. In such case, failure to file an abstract is treated as an irregularity only. Jennie Lind M. Co. v. Eureka M. Co., Sickel's Min. Dec. 223, 231.

145. The abstract of title required to be filed by an adverse claimant who claims as transferee of a locator need not be furnished if the records have been lost. Hawkeye Placer v. Gray Eagle Placer, 15 L. D. 45.

146. Neither abstract nor plat was filed during publication of notice of application for patent. An abstract was afterward filed and an unofficial plat. Suit was commenced. Proceedings were suspended in the Land Department pending the suit. Com'r to Sacramento, Cal., Office, Jan. 28, 1893, *In re* Evening Star Placer.

147. An adverse claimant must positively allege ownership. One claiming an equitable right only, cannot be considered an adverse claimant. Shoo Fly Lode v. Mono Lode, 1 C. L. O. 135.

148. An adverse claimant must show right of possession as against the United States as well as against the other party. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

149. An adverse claimant must show that his is a valid subsisting mining claim. Hawley Cons. M. Co. v. Memnon M. Co., 2 C. L. O. 178.

150. Adverse claimants are not required to show affirmatively compliance with all the local usages and customs; but they should show enough to make it conclusive that they are acting in good faith. Jennie Lind M. Co. v. Eureka M. Co., Sickel's Min. Dec. 223, 231; Hawley Cons. M. Co. v. Memnon M. Co., Sickel's Min. Dec. 235; 2 C. L. O. 178.

151. An adverse claimant is not required to show to the satisfaction of the Interior Department that he has complied with the mining law to a further extent than of properly asserting his adverse claim. Bell v. Aitken, 4 C. L. O. 66.

152. An adverse claim must be made out in proper form, and filed in the proper local land office during the period of publication of application for patent, to be effective. Beckner v. Coates, 3 C. L. O. 18.

153. Strict compliance with the regulations regarding requirements of adverse claim-

ants may be waived. Hawkeye Placer v. Gray Eagle Placer, 15 L. D. 45.

154. Parties, to have their adverse claims considered, must comply with the law and the regulations. Jackson v. Tiger S. M. Co., Sickel's Min. Dec. 263; Bates v. Chambers, Sickel's Min. Dec. 265.

155. In applications for patent, proof of citizenship is not required of the original locators or intermediate owners, but of the applicants for patent or adverse claimants only. Cash Lode, 1 C. L. O. 98.

156. Proof that a locator was not a citizen before he disposed of his claim must be shown affirmatively by the adverse claimant who sets up alienage. Kempton Lode, 1 C. L. O. 178.

5. *Effect.*

157. During the pendency of a suit based upon an adverse claim filed by a placer claimant against an application for patent to a lode claim, entry must not be allowed upon said application. Clipper Mining Co., 22 L. D. 527.

158. Entry should not be allowed pending suit on an adverse claim. Brown v. Bond, 11 L. D. 150.

159. An entry allowed pending adverse suit may stand on settlement and withdrawal of the adverse claim. Gunnison Crystal M. Co., 2 L. D. 722; Meyer v. Hyman, 7 L. D. 336.

160. Where a mineral entry is allowed upon dismissal of adverse suit, it will be canceled upon the reinstatement of the suit. Iola Lode, 1 L. D. 539.

161. The allowance of a mineral entry during the pendency of adverse suit has no effect upon a patent issued after the termination of the adverse suit in favor of applicant, the allowance of the entry at that time being merely an irregularity. Deno v. Griffin, 20 Nev. 249; 20 Pac. Rep. 808.

162. Issuance of patent for a mining claim during pendency of adverse suit is no ground for dismissal of the suit. Frien v. Oggshaw, 3 Wyo. 59.

163. An adverse claim must be settled or waived before a patent can issue. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

164. A patent issued during pendency of an adverse suit is void as against the successful party to the suit. Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 114 U. S. 576; 2 Colo. Law Rep. 7.

165. An entry will be canceled if adverse suit is still pending against the application. Iola Lode, 1 L. D. 539; Meyer v. Hyman, 7 L. D. 83.

166. A mineral entry allowed during the pendency of adverse suit against the applicant need not be canceled, but remains suspended to await the determination of said suit. Meyer v. Hyman (on review), 7 L. D. 336. (Revoking Meyer v. Hyman, 7 L. D. 83.)

167. Where an adverse claim is filed against an application for patent, the applicant may (1) suspend proceedings before the Land Department and litigate with the adverse claimant, (2) relinquish the ground in conflict from his application (litigating therefor) and take patent for the remainder of his claim, or (3) dismiss his application for patent in its entirety and continue to claim under his possessory title. Branagan v. Dulaney, 2 L. D. 744.

168. In an adverse, the subject-matter of controversy having been transferred to a court of competent jurisdiction, all proceedings affecting the property must be stayed with the exception of publication and making proof thereof. Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 705.

169. An adverse claimant cannot apply for the conflict pending suit, but if such application is filed, and suit is decided in his favor, the irregularity may be waived. Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704; Gunnison Crystal M. Co., 2 L. D. 723.

170. Even though the adverse claim has been dismissed by the Land Department, if suit is commenced thereon, proceedings will be suspended pending the suit. Samuel McMaster, 2 L. D. 706.

171. Where entry has been made for a mining claim and thereafter an application is erroneously allowed for a conflicting claim, and the entryman of the first claim files an adverse claim against said application and begins suit thereon, all action will be suspended both upon said entry and said application during the pendency of said suit. Little Giant Lode, 22 L. D. 629.

172. The merits of an adverse claim may not be inquired into by the Land Department, the assertion thereof in proper manner and

institution of suit constituting a bar to any proceedings by the Land Department (sec. 2326, U. S. Rev. Stats.). Robinson v. Mayger, 1 L. D. 538.

173. Action will be suspended before the Land Department if an adverse claim showing surface conflict is filed, leaving the right to be determined in court. Robinson v. Mayger, 1 L. D. 538; Eldred v. Lasey 6 C. L. O. 34; Sickel's Min. Dec. 284.

174. Where an adverse suit is instituted prior to the filing of application for patent, all proceedings must be stayed before the Land Department until final disposition thereof. Northwestern Lode, 8 L. D. 437.

175. A. filed an application for patent and B. adversed; then B. filed an application and A. adversed. *Held*, that B.'s application was improperly allowed and must be rejected. Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704.

176. If suits are begun on an adverse claim, action on the merits will not be taken by the Land Department. Ovens v. Stephens, 2 L. D. 699; Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704.

177. The Land Department must await final disposition in court of an adverse claim. It cannot charge negligence in prosecution of the suit and declare the adverse waived. Secretary, June 25, 1879.

178. If an adverse claim is in proper form and is filed in time, the merits thereof is not a question for the Land Department, which under the law is bound to suspend action that the controversy may be settled in court. Valentine Gold Qtz. Mine, Sickel's Min. Dec. 287; King of the West Lode, Sickel's Min. Dec. 297; Ovens v. Stephens, 2 L. D. 699; Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391.

179. The question of how far the General Land Office may extend its examination into the sufficiency of an adverse claim, considered. Shoo Fly Lode v. Mono Lode, 1 C. L. O. 138.

180. Proceedings may not be taken against a mineral application on a protest during the pendency of adverse suits against the application. Swaim v. Craven, 12 L. D. 294. (NOTE.—In this case adverse suits were instituted by lode claimants against a placer application.)

181. If an adverse suit is pending against an application, the application may not be rejected. Iron Silver M. Co. v. Mike & Starr M. Co., 6 L. D. 533; Solitaire M. & M. Co. v. Sigafus, 10 L. D. 270.

182. During the pendency of a suit based upon an adverse claim against a mineral application, an amended survey of the claim applied for will not be ordered. Com'r to Surveyor General at Denver, Colo., June 26, 1896, *In re* Mollie C. Lode.

183. Entry should be allowed only on proof that suit had not been commenced within thirty days after filing of adverse claim. Com'r to Marysville Office, Dec. 19, 1878.

184. On the termination of a suit on an adverse claim, any entry made must conform to the judgment rendered. Hence, entry should not be allowed until a copy of the judgment roll is filed in the local land office. Silver King Lode, 14 L. D. 308.

185. Though an adverse claim was irregular and defective, if suit is commenced thereon proceedings will be stayed before the Land Department. Secretary, Feb. 19, 1890.

186. A motion made by the adverse claimant to dismiss an application for patent will not be allowed during pendency of a suit on an adverse claim filed in accordance with the provisions of section 2326, United States Revised Statutes. Solitaire M. & M. Co. v. Sigafus, 10 L. D. 270.

187. After application for patent and publication of notice thereof, a claim may be relocated for abandonment, and upon a showing of such abandonment and relocation the application will be canceled if no adverse claim, or suit based on an adverse claim, is pending against said application. Continental G. & S. M. Co. v. Gage, 10 L. D. 534.

188. Publication of notice of application for a mineral patent is process which brings all adverse claimants into court, and the grantee of an applicant for patent against whose application an adverse suit is pending takes *pendente lite* even though no notice of *lis pendens* is filed. People *ex rel.* Darby v. District Court, 19 Colo. 343.

189. "We can imagine several ways in which it can be shown that the adverse claim is waived without invading the jurisdiction of the court while the case is still pending,

One of these would be the production of an instrument signed by the contestant, and duly authenticated that he had sold his interest to the other party, or had abandoned his claim and his contest. Or, since the Act says that all proceedings shall be stayed in the land office from the *filing of the adverse claim*, and not from the commencement of the action in the court, within thirty days, such delay of thirty days is made, by the statute, conclusive of a waiver. A filing in the records of the court, by the plaintiff, of a plea that he abandons his cause or waives his claim, might authorize the land office to proceed." Richmond M. Co. v. Rose, 114 U. S. 576.

190. Abandonment of surface conflict by the applicant for patent does not remove suspension of action by the Land Department resulting from the filing of an adverse claim. Sacramento Lode v. Last Chance No. 2 Lode, Sickel's Min. Dec. 73.

191. An applicant against whose application an adverse is filed and suit begun may relinquish the ground in controversy and make entry of the remainder of his claim. Last Chance M. Co. v. Tyler M. Co., 7 U. S. App. 463; 54 Fed. Rep. 284; 9 U. S. App. 613; 61 Fed. Rep. 557. (Reversed in Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683.)

192. The stay of proceedings in the Land Department is removed by waiver of the adverse claim by the adverse claimant. St. Lawrence M. Co. v. Albion Cons. M. Co., 4 L. D. 117; Albion Cons. M. Co., 4 L. D. 376.

193. A. applied for patent. B. applied for a conflicting claim and A. adversed. *Held*, that on relinquishment by B. of conflict with the claim of A., as shown by adverse and as applied for, B. may make entry without regard to the adverse of A. Com'r to Glenwood Springs, Colo., Office, April 23, 1896, *In re* Homestake Lode.

194. Where a placer patentee has filed an adverse claim against the application for patent for a lode claim within the placer and has begun suit thereon, the Land Department will take no action, but will leave the parties to secure a determination of their rights in court. Iron Silver M. Co. v. Mike & Starr M. Co., 6 L. D. 533.

195. An adverse claimant whose suit has been dismissed occupies the same place as one who failed to adverse. Kannaugh v. Quartette M. Co., 16 Colo. 341; 27 Pac. Rep. 245.

196. An adverse claim having been filed and full opportunity accorded for the settlement of questions raised by a protestant (assignee of the adverse claimant), but which were not settled, the questions raised by protestants will not be entertained. Southwestern M. Co. v. Gettysburg Lode, 4 L. D. 271.

197. An adverse claimant whose adverse suit has been dismissed will not thereafter be heard to attack the validity of the applicant's title. Kannaugh v. Quartette M. Co., 16 Colo. 341; 27 Pac. Rep. 245.

198. The failure of adverse claimant to give notice to Register and Receiver of the commencement of suit in court cannot work a forfeiture of his right. Halsey v. Hewitt, Sickel's Min. Dec. 238; 5 C. L. O. 162. *Contra*, Beatty & Clements, 2 C. L. O. 82.

199. An adverse claimant should file a certificate of commencement of suit. Circular of Dec. 10, 1880, 9 C. L. O. 148.

6. *Suit.*

200. "No possessory action between persons, in any court of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States, but each case shall be adjudged by the law of possession." (Sec. 910, U. S. Rev. Stat.) Hughes v. Devlin, 23 Cal. 501; 12 Mor. Min. Rep. 241.

201. It is a general rule of law that a certificate of entry, like a patent, is conclusive of legal title; but this rule will not be followed where entry was made by the defendant in an adverse suit after the dismissal of suit, where the suit was thereafter reinstated, and the cause will be tried as though it never had been dismissed. McEvoy v. Hyman, 25 Fed. Rep. 539; 15 Mor. Min. Rep. 300.

202. Suit on an "adverse claim" is one arising under the laws of the United States, under the acts concerning removal of cases from State to Federal courts, because of Federal questions involved. Frank G. & S. M. Co. v. Larimer M. & Sm. Co., 8 Fed. Rep. 724; 1 Colo. Law Rep. 495; 1 Mor. Min. Rep. 150; Burke v. Bunker Hill & Sullivan M. & Conc. Co., 39 Fed. Rep. 644; Cheesman v. Shreeve,

37 Fed. Rep. 36; Strasburger v. Beecher, 44 Fed. Rep. 213; Jackson v. Roby, 109 U. S. 441; Wolverton v. Nichols, 119 U. S. 485; 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309; Chambers v. Harrington, 111 U. S. 350; Doe v. Waterloo M. Co., 43 Fed. Rep. 219.

203. The mere fact that an ordinary suit in ejectment, to try title, involves title to a mining claim, does not make it subject to removal from a State to a United States court on the ground that it involves a construction of Federal law. Construction of law is not "involved" when the law has been construed by the United States Supreme Court. Inez M. Co. v. Kinney, 39 Fed. Rep. 832.

204. The mere fact that a suit involves proof and construction of local mining laws, rules and regulations will not justify the removal of the case to a Federal court as a case arising under the laws of the United States. Trafton v. Nougues, 4 Sawy. 178.

205. The decision of a State court as to what constitutes the commencement of a suit in that court, not presenting a Federal question, is not reviewable before the United States Supreme Court. Richmond M. Co. v. Rose, 114 U. S. 576.

206. What constitutes the commencement of suit upon an adverse claim is a matter to be determined by the law of the State. In Nevada suit is begun by filing of a complaint. Richmond M. Co. v. Rose, 114 U. S. 576.

207. Under the New Mexican statute providing that "All suits at law in the district courts shall be commenced by filing a declaration in the office of the clerk of the court," the filing of a declaration constitutes the commencement of a suit as required by section 2326, United States Revised Statutes, even though a summons did not issue within thirty days from date of filing the adverse claim in the land office. De Garcia v. Eaton, 22 L. D. 16. (Affirming Commissioner's decision of March 6, 1894.)

208. In determining whether an adverse judicial proceeding has been instituted within the statutory period, the Department will not undertake to review an order of a court of competent jurisdiction recognizing the initiation of such proceedings within said period while the suit so begun is pending in said court. Catron v. Lewishon, 23 L. D. 20.

209. The filing of a declaration is the beginning of suit, though no fees be paid and no summons issued. Richmond M. Co. v. Rose, 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; 114 U. S. 576.

210. An adverse claimant who relies upon the United States mail in commencing suit must abide the consequences should delay ensue through misfortune or accident. Pride of the West Mine, 4 C. L. O. 34.

211. Suit on an adverse must be commenced within thirty days from filing adverse claim, or the adverse claim will be held to have been waived. Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584; Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704; Downey v. Rogers, 2 L. D. 707; Branagan v. Dulaney, 2 L. D. 744; Southwestern M. Co. v. Gettysburg Lode, 4 L. D. 271.

212. Suit must be commenced upon an adverse claim within thirty days from date of filing of the adverse claim in the land office, and the running of said time is not stayed by a decision of the local office dismissing the adverse claim, and an appeal from said decision by the adverse claimant. Scott v. Maloney, 22 L. D. 274.

213. Where a second application is allowed for land embraced in a prior application, by reason of the fact that the survey showed no conflict, and the second applicant, being misled by the action of the land office, failed to adverse the first application, such second application may be treated as an adverse claim (and the second applicant in this case was allowed thirty days from the decision, within which to begin suit). Hall v. Street, 3 L. D. 40.

214. Failure to commence suit within the required period because of the provision of a State statute is fatal to the right of an adverse claimant before the Land Department. Harriet M. Co. v. Phœnix M. Co., 9 C. L. O. 165.

215. As in South Dakota an action is begun by service of summons, if this is not done within thirty days from filing of adverse in the local land office, the adverse suit will not be considered as commenced within the time allowed by law. Mars v. Oro Fino M. Co., 65 N. W. Rep. 19.

216. When defendants demur, answer and go to trial, it is then too late to raise the objection that the complaint was not filed within the time prescribed by the statute. Richmond M. Co. v. Rose, 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; 114 U. S. 576.

217. The failure to commence suit through the ill-advised or corrupt and dishonest action of adverse claimant's attorney cannot be redressed by the Land Department. Pride of the West Mine, 4 C. L. O. 34.

218. An adverse claimant who fails to institute suit thereby waives the right to set up before the Land Department matters properly determinable in court on an adverse suit. Southwestern M. Co. v. Gettysburg Lode, 4 L. D. 271.

219. An adverse suit not brought within thirty days after filing of the adverse claim in the land office may be dismissed in court. But the motion to dismiss must be made in the trial court, and not on appeal. Marshall S. M. Co. v. Kirtley, 12 Colo. 410; 21 Pac. Rep. 492.

220. Where a second suit is commenced after the expiration of thirty days from date of filing of the adverse claim in the land office, the adverse claim will be treated as a protest. Boston Hydr. G. M. Co. v. Eagle Copper & S. M. Co., Sickel's Min. Dec. 320.

221. A. filed application, and during publication B. applied for the same ground. B. is allowed to begin suit within thirty days as on an adverse, because he was misled by the error of the local land office in receiving and filing his application. Hall v. Street, 3 L. D. 40.

222. In the absence of proof to the contrary, it will be presumed that suit was begun in time on an adverse claim. Temple v. Doolittle, Secretary, Oct. 12, 1882.

223. The question of whether or not an adverse suit has been prosecuted with reasonable diligence is one to be determined, not by the Land Department, but by the court having jurisdiction over the suit. Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; 114 U. S. 576; Iowa M. Co. v. Bonanza M. Co., Sickel's Min. Dec. 288; Copp's Min. Lands, 243; 6 C. L. O. 75; Moffat v. Compromise Lode, 8 C. L. O. 54; J. S. Wallace, 1 L. D. 583; De Garcia v. Eaton, 22 L. D. 16.

224. If the defendant thinks a suit based upon an adverse claim has not been prosecuted with reasonable diligence, he should move the court to dismiss the case for want of prosecution, and, if the motion is granted, cause the judgment to be certified to the General Land Office. Iowa M. Co. v. Bonanza M. Co., Sickel's Min. Dec. 288; 6 C. L. O. 75.

225. The provisions of the law for the adjudication of adverse claims do not contemplate that the controversy shall be indefinitely postponed upon the simple filing of a complaint. It must be prosecuted with due diligence. Lonergan v. Eddy, Sickel's Min. Dec. 291; 7 C. L. O. 82.

226. A suit decided by the district and supreme courts of a State, as to the right of possession, is one which has finally been adjudicated by the courts of competent jurisdiction, and an appeal to the Supreme Court of the United States should not longer delay proceedings before the Land Department. Bullion M. Co. v. 420 Mining Co., 2 C. L. O. 5.

227. Failure to prosecute the suit brought on an adverse claim is a waiver of right. Nichols v. Becker, 11 L. D. 8; Nettie Lode v. Texas Lode, 14 L. D. 180; Iowa M. Co. v. Bonanza M. Co., Sickel's Min. Dec. 288; 6 C. L. O. 75.

228. The voluntary dismissal of a suit based on an adverse claim is an abandonment of such claim. Monroe Lode, 4 L. D. 273; Caledonia G. M. Co., 12 C. L. O. 264.

229. A patent may issue for a mining claim, where a waiver of adverse claim is filed in the land office, without requiring evidence of the disposition of the suit instituted on the adverse claim. St. Lawrence M. Co. v. Albion Cons. M. Co., 4 L. D. 117.

230. Relinquishment of the conflict by the applicant for patent, made after the suit is commenced, is of no effect. (Regulations, par. 91.) *Contra*, Com'r to Leadville Office, Feb. 24, 1887, *In re* Jamie Lee Lode.

231. Relinquishment by the applicant for patent of the land originally in conflict does not authorize the Land Department in reassuming jurisdiction of the case during the pendency of judicial proceedings by an adverse claimant, who has been permitted in such proceedings to amend so as to embrace a larger quantity of land than was included in the original adverse. Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391.

232. A waiver of adverse suit by the adverse claimant, to be effective, must be submitted to the court and the suit dismissed. St. Lawrence M. Co. v. Albion M. Co., 10 C. L. O. 51. (Reversed, S. C., 4 L. D. 117–376.)

233. A waiver of an adverse claim is effective when filed in the local land office, without reference to pending judicial pro-

ceedings. St. Lawrence M. Co. v. Albion Cons. M. Co., 4 L. D. 117; Albion Cons. M. Co., 4 L. D. 376.

234. An application for patent will be rejected where it appears that a previous application for the same premises has been filed and withdrawn because of pendency of a suit in court commenced by an adverse claimant. Brown v. Lewis, 1 C. L. O. 50.

235. No action can be taken in the Land Department on a mineral application during pendency of adverse proceedings. Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391; C. T. Wheeler, 7 C. L. O. 130.

236. A motion to dismiss an application for patent will not be entertained prior to disposition of adverse proceedings duly initiated and pending in the courts. Iron Silver M. Co. v. Mike & Starr M. Co., 6 L. D. 533; Solitaire M. & M. Co. v. Sigafus, 10 L. D. 270.

237. Where suit was duly instituted on an adverse claim, and a subsequent application by the adverse claimant for the same ground has been received and duly adversed by the original applicant, and suit commenced, the Land Department has jurisdiction to dismiss the second application. Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704. The Department will not dismiss the second application while one or both suits are pending. Miner v. Marriott, 2 L. D. 712.

238. While a suit brought under the provisions of section 2326, United Stated Revised Statutes, is pending undetermined in court, it is not for the Land Department to decide whether or not suit has been prosecuted with reasonable diligence; and a patent issued by the Land Department during the pendency of such a suit involving the land is issued without authority of law, is void, and may be attacked collaterally in a court of law. Richmond M. Co. v. Rose, 114 U. S. 576. See S. C., 17 Nev. 25; 2 Colo. Law Rep. 7; 25 Pac. Rep. 1105.

239. Though the adverse claim was irregular and defective, if suit has been commenced thereon, proceedings will be stayed before the Land Department. Secretary, Feb. 19, 1890; Reed v. Hoyt, 1 L. D. 603.

240. Although an adverse claim was defective in that it was sworn to (before the Act of April 26, 1882, 22 Stats. 49) by the agent of the adverse claimants, action will be suspended by the Land Department if suit has been instituted thereon. Samuel McMaster, 2 L. D. 706.

241. No abstract was filed during the period of publication, and no plat was filed during that time. An abstract was afterward filed and an unofficial plat. Suit was commenced. Proceedings were thereupon suspended in the Land Department. Com'r to Sacramento Land Office, Jan. 23, 1893, *In re* Evening Star Placer.

242. The grantee of an applicant for patent, against whom an adverse suit is pending, takes *pendente lite* even though no notice of *lis pendens* is filed, as publication of notice of application is process to bring all adverse claimants into court. People *ex rel.* Darby v. District Court, 19 Colo. 343.

243. An entry should not be allowed pending suit based on an adverse claim against the application for patent. Brown v. Bond, 11 L. D. 150; Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391. (Citing Richmond M. Co. v. Rose, 114 U. S. 576.)

244. Where two co-owners of a mining claim file an adverse against an application for patent, and institute separate suits thereon, in different courts, the Land Department will not allow entry upon the application inclusive of the conflict, during the pendency of either of said suits. Black Queen Lode v. Excelsior No. 1 Lode, 22 L. D. 343.

245. Entry should not be allowed where the claim applied for is involved in a pending suit to determine the right of possession thereto, instituted prior to publication of notice of application for patent. If on said suit it is adjudged that the applicant is not entitled to the possession of a part of the claim, he will not be allowed to enter such part. Northwestern Lode & Mill Site Co., 8 L. D. 487.

246. An entry will be canceled if the adverse suit is still pending. Iola Lode, 1 L. D. 539; Myers v. Hyman, 7 L. D. 83. (Revoked, 7 L. D. 336.)

247. An entry allowed during pendency of an adverse suit may be permitted to stand upon the withdrawal of the adverse claim. Gunnison Crystal M. Co., 2 L. D. 722; Meyers v. Hyman (on review), 7 L. D. 336.

248. An entry prematurely allowed while suit based on an adverse claim is pending will remain suspended pending final disposition of the suit. Com'r to Lake City Office, Dec. 6, 1887.

249. An adverse claimant whose adverse suit has been dismissed cannot complain of the fact that entry was made and patent issued for the claim applied for during pendency of such suit, and the validity of the patent is not affected by such irregularity in the allowance of entry and issuance of patent. Deno v. Griffin, 20 Nev. 249; 20 Pac. Rep. 308.

250. An adverse claimant cannot apply for conflicting ground pending suit, but if such application is filed, and suit is decided in his favor, the irregularity may be waived. Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704; Gunnison Crystal M. Co., 2 L. D. 722.

251. An entry regularly allowed, on dismissal of suit based on an adverse claim was properly canceled on reinstatement of the suit by order of the court. Marshall S. M. Co., Secretary, April 30, 1881.

252. An entry allowed after dismissal of an adverse suit is no bar to the reinstatement of such suit. McEvoy v. Hyman, 25 Fed. Rep. 539.

253. Mineral entry should be allowed only on proof that suit had not been commenced within thirty days after filing of the adverse claim. Halsey v. Hewitt, Sickel's Min. Dec. 238; 5 C. L. O. 162.

254. A. filed application; B. subsequently filed application for part of same ground, and adversed A. and commenced suit; before judgment (which was in B.'s favor) he (B.) made mineral entry. In view of judgment, and A.'s acquiescence therein, the question is between B. and the government, and the irregularity in that case may be waived. Gunnison Crystal M. Co., 2 L. D. 722.

255. If a suit to determine the right of possession of a mining claim is pending at the time of publication of notice of application for patent therefor by one of the parties, it is not necessary that the other party should file an adverse claim, but he need only show the pendency of said suit to procure a stay of proceedings before the land office. Northwestern Lode and Mill Site Co., 8 L. D. 437; Shoo Fly Lode v. Mono Lode, 1 C. L. O. 135.

256. The pendency of a suit brought by the applicant against the adverse claimant does not excuse compliance with the law on the part of such adverse claimant. Bullion M. Co. v. 420 Mining Co., 2 C. L. O. 5.

257. Adverse suit should be brought by the heirs, not by the administrator of deceased. Keeler v. Trueman, 15 Colo. 143; 25 Pac. Rep. 311.

258. The party who sets up the adverse should commence the suit, except in cases where the adverse claimant is in possession of the premises. Becker v. Central City Town Site, Sickel's Min. Dec. 302; 2 C. L. O. 98.

259. An adverse claim will not be dismissed for technical defects where suit has been begun thereon. Robinson v. Mayger, 1 L. D. 538; Reed v. Hoyt, 1 L. D. 603.

260. The merits of an adverse claim properly presented is not a proper subject of consideration by the Land Department, even though, on the face of the adverse filed in the local office, the adverse claimant appears to have no case. Bay State G. M. Co. v. Trevillion, 10 L. D. 194.

261. When the case is properly in court, record evidence in the land office, going to the merits thereof, cannot be considered to destroy the *prima facie* sufficiency of the adverse claim. Moffat v. Compromise Lode, 8 C. L. O. 54.

262. Where suit has been commenced to determine the right of possession, the only question that can arise in the land office is whether the adverse claimant has so complied with the law as to bring his case within it. Chambers v. Pitts, Sickel's Min. Dec. 298.

263. During pendency of an adverse suit, action on the merits of the case will not be taken by the land office. Ovens v. Stephens, 2 L. D. 699: Moffat v. Compromise Lode, 8 C. L. O. 54; Iola Lode, 1 L. D. 539. *Contra*, Higgins v. John G. M. Co., 14 C. L. O. 238.

264. The courts are to decide all questions as to the relative rights of contesting claimants. Eldred v. Lasey, Sickel's Min. Dec. 284; Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584.

265. The question of the jurisdiction of the court must be pleaded in court, and should not be decided in the land office. Nevada Reservoir Ditch Co. v. Rogers, Sickel's Min. Dec. 298.

266. The jurisdiction originally assumed by the courts is now recognized by the statute. Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584.

267. Questions of possessory rights must be settled in court. Orient Lode, Sickel's Min. Dec. 104.

268. Adverse claims to the possessory title to mining claims may be adjudicated only in a court of competent jurisdiction. Frederick A. Williams, 17 L. D. 282.

269. "The only place in which controversies between conflicting mineral claimants or adverse claimants can be heard is a court of competent jurisdiction." Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584.

270. All questions of location and maintenance thereof involved in decision of adverse claims are to be decided by the courts. Ovens v. Stephens, 2 L. D. 699; Branagan v. Dulaney, 2 L. D. 744; Southwestern M. Co. v. Gettysburg Lode, 4 L. D. 271; Bay State G. M. Co. v. Trevillion, 10 L. D. 194.

271. The Land Department has no jurisdiction to determine or pass upon controversies between adverse claimants as to the right of possession of a mining claim, or upon any question as to the priority of such right. Bright v. Elkhorn M. Co., 8 L. D. 122.

272. The date of location by the adverse claimant, and the competency of a corporation under the State laws to make such location, are questions of title and properly matters for judicial determination. Bay State G. M. Co. v. Trevillion, 10 L. D. 194.

273. "The Executive Department has no jurisdiction of adverse mineral claims, which under the law, are adjudicated exclusively by the courts." Waterhouse v. Scott, 13 L. D. 718.

274. Where a court has jurisdiction, it has a right to decide every question which occurs in the case. Elliott v. Piersall, 1 Pet. 340; Iowa M. Co. v. Bonanza M. Co., Sickel's Min. Dec. 288; 6 C. L. O. 75.

275. As the courts have exclusive jurisdiction over suits, error can only be corrected by the proper appellate tribunal. Iola Lode, 1 L. D. 539.

276. The validity of a placer patent with which a lode conflicts is a matter for the courts to determine, not for the Land Department. Pikes Peak Lode, 10 L. D. 200. *Contra*, South Star Lode, 20 L. D. 204.

277. To be recognized by the Land Department under the provisions of section 2326, United States Revised Statutes, a suit must be based upon an adverse claim filed during the sixty days of publication of notice of application for patent, and must be commenced within thirty days after the filing of such adverse. Nettie Lode v. Texas Lode, 14 L. D. 180.

278. Action of the Department on an application for patent cannot be controlled by judicial proceedings instituted outside of the authority of section 2326, United States Revised Statutes. Nichols v. Becker, 11 L. D. 8.

279. An adverse claimant who dismisses his suit cannot delay an application for patent by commencing a second suit. Wood v. Hyde, 1 C. L. O. 66.

280. Where the first adverse suit was dismissed, a second suit commenced after the expiration of thirty days from date of filing of the adverse claim constitutes no bar to entry of the claim applied for. Boston Hydr. G. M. Co. v. Eagle Copper & S. M. Co., Sickel's Min. Dec. 320; Morse v. Streeter, Copp's Min. Dec. 127; Pride of the West Mine, 4 C. L. O. 34.

281. A second suit begun long after the thirty days cannot be considered by the General Land Office, nor allowed to retard the progress to patent of applicant's claim. Pelican Lode, Sickel's Min. Dec. 191.

282. Where suit is dismissed, the case will not be suspended in order that a second suit may be brought. Tierney v. Miller, Sickel's Min. Dec. 299; Boston Hydr. G. M. Co. v. Eagle Copper & S. M. Co., Sickel's Min. Dec. 320.

283. A suit in equity to enjoin defendants from applying for patent is not an action which can be taken notice of by the land office. Waterman v. Daley, Sickel's Min. Dec. 330.

284. A suit commenced before a court of one judicial district against a claim situate within a different district is not commenced in a court of competent jurisdiction. Nevada Reservoir Ditch Co. v. Rogers, 6 C. L. O. 105.

285. Suits on several adverses between the same parties may be combined. Marshall S. M. Co. v. Kirtley, 12 Colo. 410; 21 Pac. Rep. 492.

286. Proof of "no suit." Various court certificates required. Circular of July 6, 1883, 2 L. D. 725.

287. The complaint in a suit brought under the provisions of section 2326, United States Revised Statutes, must allege that the plaint-

iff is a citizen or has declared his intention to become a citizen, as the right to enter the land may depend on the judgment to be rendered. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217; McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076; Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324; Lee Doon v. Tesh, 6 Pac. Rep. 97.

288. The complaint, under section 2326, United States Revised Statutes, should allege citizenship of plaintiffs. If A. and B. are plaintiffs and only A.'s citizenship is alleged, the complaint will be dismissed on demurrer as to B. Lee Doon v. Tesh, 6 Pac. Rep. 97.

289. On an adverse suit the complaint must set forth the citizenship of plaintiffs and their grantors. Keeler v. Trueman, 15 Colo. 143; 25 Pac. Rep. 311.

290. Where adverse complaint by two persons alleges citizenship of one only, on demurrer the suit will be dismissed as to the other plaintiff. Lee Doon v. Tesh, 68 Cal. 43; 8 Pac. Rep. 621.

291. On an adverse suit if the citizenship of parties is not shown the omission is fatal to their right of recovery. O'Reilly v. Campbell, 116 U. S. 418.

292. On adverse suit, proof of citizenship may consist, in case of an individual, of his own affidavit thereof, and, in case of an association of persons unincorporated, of the affidavit of their authorized agent made upon his own knowledge or upon information and belief. O'Reilly v. Campbell, 116 U. S. 418.

293. A party to an adverse suit claiming under a relocation made by a corporation must allege and prove such corporation to have been organized in some of the States or Territories of the United States, and that its members were individually qualified to make the location. Thomas v. Chisholm, 13 Colo. 105; 21 Pac. Rep. 1019.

294. In actions under section 2326, United States Revised Statutes, objections as to citizenship cannot be taken in the United States Supreme Court for the first time. O'Reilly v. Campbell, 116 U. S. 418.

295. Alienage of a mineral claimant may be set up only by the United States or by the State, except in adverse proceedings under the mining law, when it may be shown by an adverse claimant for the purpose of defeating the application. Billings v. Aspen M. & Sm. Co., 52 Fed. Rep. 250.

296. Title of a claimant of the public mineral lands as locator of a mining claim may not be questioned on ground of alienage by any one excepting the United States, or in proceedings to obtain an United States patent (on adverse suit). Billings v. Aspen M. & Sm. Co., 10 U. S. App. 1, 322; 51 Fed. Rep. 338; Wood v. Aspen M. & Sm. Co., 36 Fed. Rep. 25.

297. An adverse complaint must allege location to have been made in accordance with mining district rules, and proof of compliance with them must be made. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304 (second trial, 17 Colo. 243; 29 Pac. Rep. 173); Sullivan v. Hense, 3 Colo. 424; 9 Mor. Min. Rep. 487; Cons. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 213; 15 Mor. Min. Rep. 490.

298. In an action not under section 2326, United States Revised Statutes, a general allegation of ownership of the mining claim in the complaint is sufficient. Donahue v. Johnson, 9 Wash. St. 187.

299. An adverse complaint alleging the plaintiff to be the owner of the land in conflict by title adverse to defendant's, and that defendant's claim is without right, is sufficient. Rough v. Simmons, 3 Pac. Rep. 804; Rough v. Booth, 3 Pac. Rep. 805.

300. An averment in pleading that land is vacant public land, and that a location notice was posted thereon, is not a sufficient allegation of a legal location. Jones v. Jackson, 9 Cal. 238; Hall v. Arnot, 80 Cal. 348; 22 Pac. Rep. 200.

301. An adverse complaint was held bad on demurrer wherein was set forth the location certificate and oath thereto, the oath not covering all material facts set forth in the location certificate. McCowan v. Maclay, 16 Mont. 234; 40 Pac. Rep. 602.

302. Where the plaintiff, in his petition, asserts a claim to a certain tract, and the defendant, in his answer, admits that he has applied for patent for the same tract, the conflict as to right of possession sufficiently appears. If the defendant did not wish to contest plaintiff's claim he should have disclaimed. Wolverton v. Nichols, 2 Pac. Rep. 308; 119 U. S. 485; 15 Mor. Min. Rep. 309.

304. An adverse complaint under the Nevada statutes need only set up filing of min-

eral application by the defendant, and adverse ownership by the plaintiff. Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; 114 U. S. 576.

305. The sufficiency of an adverse complaint which simply alleges the plaintiff to be the owner of the ground in controversy is waived by traversing his allegation. Bushnell v. Crooke M. & Sm. Co., 11 Colo. 247; 21 Pac. Rep. 931.

306. An adverse complaint should allege all material facts as to plaintiff's ownership, that application for patent has been filed by defendant, that the suit is based on an adverse claim duly filed in the land office, and should show the conflict between the claims. Cronin v. Bear Creek G. M. Co., 32 Pac. Rep. 204: Mattingly v. Lewisohn, 8 Mont. 259; 19 Pac. Rep. 310; Anthony v. Jillson. 83 Cal. 296; 23 Pac. Rep. 419.

307. An adverse suit should be dismissed if the defendant shows that the suit was not predicated upon an adverse filed in proper time in the local land office. Marshall S. M. Co. v. Kirtley, 12 Colo. 410; 21 Pac. Rep. 492: Hunt v. Eureka Gulch M. Co., 14 Colo. 451; 24 Pac. Rep. 550.

308. A plaintiff in an adverse suit need not show possession of land in controversy, but is required to show right of possession. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

309. Though in ejectment to recover possession of a mining claim, if a defendant relies on forfeiture by plaintiff he must plead it specially (Morenhaut v. Wilson, 52 Cal. 268), this is not the rule in adverse suits, where the better title must prevail, and if neither has it neither will have judgment. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292. *Contra*, Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

310. In an action for the possession of a mining claim, a party relying upon a forfeiture by his adversary must specifically plead such forfeiture; and the facts constituting the same must be alleged and must be proved upon the trial. Wulff v. Manuel, 9 Mont. 279; 23 Pac. Rep. 723.

311. Where forfeiture is relied upon to defeat the opposing party to a suit, it must be pleaded in order to render proof thereof admissible. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

312. To prevail in an adverse suit, a party, whether plaintiff or defendant, must show not mere occupancy of the premises in controversy, but a compliance with the law, customs and regulations. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304: Bryan v. McCaig, 10 Colo. 309; 15 Pac. Rep. 413.

313. In an adverse suit each party must prove his title, and, if no proof is submitted, the suit will simply be dismissed without judgment. Bay State S. M. Co. v. Brown, 10 Sawy. 243.

314. The question at issue in a suit based upon an adverse claim is the priority of right to purchase the fee of the land involved from the government. One who already has the fee to the land is not obliged to proceed under section 2326, United States Revised Statutes. Bennett v. Harkrader, 158 U. S. 441.

315. Each party to an adverse suit must prove his own right and title. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

316. A plaintiff who brings an action to recover possession of a mining claim must show a good location. Terrible M. Co. v. Argentine M. Co., 5 McCrary, 639.

317. An adverse suit is to determine who is entitled to a patent to the disputed ground. Burke v. McDonald, 2 Idaho, 310; 13 Pac. Rep. 351.

318. In an adverse suit each party must prove his right to a patent by a compliance with the statutes, State and Federal, and with miners' rules and regulations in force relative to location, in order to recover a judgment for the ground in controversy. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304. (Second trial, 17 Colo. 243; 29 Pac. Rep. 173.)

319. Plaintiff on adverse suit cannot recover if defendant proves possession of the claim during period prescribed by the State Statutes of Limitation. 420 M. Co. v. Bullion M. Co., 9 Nev. 240; 3 Sawy. 634; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

320. An adverse suit brought in a State court is governed by the same rules, principles and statutes as similar actions brought under State laws (except with regard to the judgment). 420 M. Co. v. Bullion M. Co., 9

Nev. 240; 3 Sawy. 634; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608; Iba v. Central Association of Wyoming, 42 Pac. Rep. 20.

321. A tenant in common may maintain an action for the recovery of a mining claim without joining his co-tenant. Morenhaut v. Wilson, 52 Cal. 263; 1 Mor. Min. Rep. 53.

322. Improvements made by trespassers upon a mining claim may not be purchased by a claimant after suit brought to determine right of possession, and then be considered as having been made originally by claimant. Little Gunnell M. Co. v. Kimber, 1 Mor. Min. Rep. 536 (Colo.).

323. Intervention in an adverse suit will not be allowed where the one seeking to intervene has not filed an adverse claim in the land office. Mont Blanc Cons. Gravel M. Co. v. De Bour, 61 Cal. 364; 15 Mor. Min. Rep. 286; 9 C. L. O. 205.

324. In Utah a suit cannot be dismissed by stipulation only; an order of dismissal must follow. Shoo Fly Lode v. Mono Lode, 1 C. L. O. 135.

325. An allegation of an adverse claim shown on a proper map is good notice, and if sufficient for the basis of a suit in court the Land Department should await judgment. Robinson v. Mayger, 1 L. D. 588.

326. A suit brought under section 2326, United States Revised Statutes, is an action to settle a controverted right to a patent from the United States for the land in controversy. Wolverton v. Nichols, 119 U. S. 485; 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309.

327. When plaintiff's ownership and right of possession are put in issue by answer, he must show affirmatively a compliance with the act of Congress and local rules and regulations, and that he had thereby made a valid location. Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291.

328. The pleadings of each party to an adverse suit must show title. Cronin v. Bear Creek G. M. Co., 32 Pac. Rep. 204; Anthony v. Jillson, 88 Cal. 296; 23 Pac. Rep. 419; Cadierque v. Duran, 49 Cal. 356.

329. On an adverse suit, if the defendant shows a *prima facie* good location, the plaintiff must either show a better one or that defendant's lode does not extend into the ground in conflict. Patterson v. Hitchcock, 8 Colo. 533; 5 Mor. Min. Rep. 542.

330. In Montana suits are entertained based on adverse claims filed by lode claimants against an application for a placer patent. Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287; Railroad Lode v. Noyes Placer, 9 L. D. 26.

331. The Colorado courts entertain adverse suits brought by lode claimants against placer applicants. Alice Placer, 4 L. D. 314.

332. A defendant in an adverse suit cannot defeat plaintiff's title by showing that a forfeiture notice given by plaintiff to co-owners was insufficient. That point may be raised only by the co-owners. Becker v. Pugh, 17 Colo. 243; 29 Pac. Rep. 173. (Second trial, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304.)

333. Defendants in an adverse suit who depend upon a location made by a corporation must allege the qualification of the corporation to locate the claim. Thomas v. Chisholm, 13 Colo. 105; 21 Pac. Rep. 1019.

334. Suit may be brought to quiet title on ground of fraud after a mineral entry has been made. Lee v. Justice M. Co., 29 Pac. Rep. 1020.

335. A defendant in an adverse suit may set up title in his answer and secure judgment declaring him to be the owner if he prove title. Perego v. Dodge, 9 Utah, 3; 33 Pac. Rep. 221.

336. One party to an adverse suit may show the location of the other to be invalid, because based upon a discovery made within a prior, subsisting location, without connecting himself with such prior location. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.) Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

337. In adverse proceedings defendant may defeat plaintiff's claim by showing that plaintiff's location was upon land not subject to location, having been included in the exterior limits of a patent to a third person. Girard v. Carson, 44 Pac. Rep. 508. (Citing Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.) Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

338. On an adverse suit either party may show the invalidity of the other's location from any cause, even by showing the discovery workings to be situated on ground cov-

ered by a valid prior location of a third party. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.) Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362.

339. A variance between the adverse filed in the land office and the one on which suit is brought is not a ground for revoking the suspension of the case before the Land Department. Bay State G. M. Co. v. Trevillion, 10 L. D. 194; Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391.

340. An adverse suit may be brought in proper form. If plaintiff is in possession, he should sue to quiet title. If not in possession, he should bring an action in the nature of ejectment. Wolverton v. Nichols, 2 Pac. Rep. 308; 119 U. S. 485; 15 Mor. Min. Rep. 309.

341. Under the Montana statutes, a suit based upon an adverse claim against an application for a mineral patent may be tried either as a suit at law, in which case the facts must be tried by a jury, unless the right is expressly waived, or it may be heard as an equity suit, without a jury, accordingly as the relief asked is legal or equitable. Hammer v. Garfield M. & M. Co., 130 U. S. 291.

342. An adverse complaint may be in the form of a bill to quiet title where complainants are in possession. Houtz v. Gisborn, 1 Utah, 178; 2 Mor. Min. Rep. 340.

343. An adverse suit may be maintained by one in possession. Hamilton v. Southern Nevada G. & S. M. Co., 33 Fed. Rep. 562; 13 Sawy. 113; 15 Mor. Min. Rep. 814.

344. An adverse suit may be brought on the equity side of the court, and in such case the parties may not demand a jury trial as a matter of right, that matter being governed by equity practice. Doe v. Waterloo M. Co., 43 Fed. Rep. 219.

345. An adverse suit in Colorado should be in the nature of an action of ejectment. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304. (Second trial, 17 Colo. 243; 29 Pac. Rep. 173.)

346. In an adverse suit in nature of an action of ejectment, ouster need not be proven by plaintiff. Wolverton v. Nichols, 119 U. S. 485; 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309.

347. An action under section 2326, United States Revised Statutes, is a legal, not an equitable action, and the fact that a decree instead of a judgment is prayed in the complaint is immaterial. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304. (Second trial, 17 Colo. 243; 29 Pac. Rep. 173.)

348. Suit on an adverse differs from ejectment in that it may be brought by the party in possession. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304. (Second trial, 17 Colo. 243; 29 Pac. Rep. 173.)

349. If an adverse claimant, alleging himself to be in possession of the premises, brings his suit in the form of a bill in equity to quiet title, he cannot object to the fact that, under equity practice, the case is not tried by a jury. Perego v. Dodge, 163 U. S. 160. (Affirming Perego v. Dodge, 9 Utah, 3; 33 Pac. Rep. 291.)

350. Trial on an adverse suit may be by the court without a jury by consent of parties. Noonan v. Caledonia G. M. Co., 121 U. S. 393.

351. The act of March 3, 1881 (21 Stat. 505), does not render a trial by jury necessary in a suit based upon an adverse claim if it would not be required otherwise. Perego v. Dodge, 163 U. S. 160; S. C., 9 Utah, 3; 33 Pac. Rep. 221.

352. An adverse claimant to a placer mine, who has executed an instrument by which he agrees to convey the premises in dispute at some future time to a tenant in possession, may, under the Code of Montana, and sections 2325 and 2326, United States Revised Statutes, maintain an action in the courts of Montana to determine the right of possession of the premises in dispute. Wolverton v. Nichols, 2 Pac. Rep. 308; 119 U. S. 485; 15 Mor. Min. Rep. 309.

353. The owner of a mining claim, holding under possessory title, who has agreed to convey good and sufficient title thereto, the prospective transferee being in possession, has such an interest in the property as entitles him to file an adverse claim against an application for patent to a conflicting claim and to have a trial thereon. This right cannot be affected by State laws relating to possessory actions. (Reversing the Supreme Court of Montana.) Wolverton v. Nichols, 119 U. S. 485; 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309.

354. Actual possession is not required to entitle a person holding under a location to bring suit under section 2326, United States

Revised Statutes. Burke v. McDonald, 2 Idaho, 310; 13 Pac. Rep. 351; 2 Idaho, 1022; 29 Pac. Rep. 98; 2 Idaho, 646; 33 Pac. Rep. 49.

355. An adverse claim may be supported by possession of the property by a tenant of the adverse claimant. Wolverton v. Nichols, 119 U. S. 485; 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309.

356. An adverse claim may be prosecuted by one who has covenanted to convey the property, as he could not otherwise keep his covenant. Wolverton v. Nichols, 119 U. S. 485; 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309.

357. In possessory actions, proof of possession of a mining claim is *prima facie* evidence of title. Patchen v. Keeley, 19 Nev. 404; 14 Pac. Rep. 847; Lebanon M. Co. v. Cons. Republican Mtn. M. Co., 6 Colo. 381; Sears v. Taylor, 4 Colo. 38; Funk v. Sterrett, 59 Cal. 613; Noyes v. Black, 4 Mont. 527; 2 Pac. Rep. 769.

358. If A. locates a claim in the name of B., and holds and works the same, the law presumes it to be done by A. as agent of B., and A. can maintain no action for the claim in his own name. Van Valkenburg v. Huff, 1 Nev. 142; 9 Mor. Min. Rep. 467.

359. The sufficiency of the adverse claim filed in the land office may not be questioned by a court on adverse suit. Quigley v. Gillett, 101 Cal. 462; 35 Pac. Rep. 1040.

360. In an action upon an adverse claim, where plaintiffs, as evidence of their title, had introduced the receiver's receipt for the entry thereof, it is admissible for the defendants to prove by decisions of the Land Department that the entry had been canceled and set aside on the protest against the issuance of patent. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

7. *Judgment.*

361. In an adverse suit it should be determined whether or not either party is entitled to make entry of and secure a patent for the ground in controversy or any part thereof. Jackson v. Roby, 109 U. S. 440; Wolverton v. Nichols, 119 U. S. 485; 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309; Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324; Lee Doon v. Tesh, 68 Cal. 43; 8 Pac. Rep. 621; McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329; Manning v. Strehlow, 11 Colo. 451; 18 Pac. Rep. 625; Thomas v. Chisholm, 13 Colo. 105; 21 Pac. Rep. 1019; Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Burke v. McDonald, 2 Idaho, 646; 33 Pac. Rep. 49; Waterloo M. Co. v. Doe, 56 Fed. Rep. 685.

362. On adverse suit it should be determined whether or not either party has a right to the land in controversy under the law. Mere failure on the part of the plaintiff to prove his case does not relieve defendant from showing his title. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292; McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291; Lee Doon v. Tesh, 68 Cal. 43; 8 Pac. Rep. 621; Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324; Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419; Becker v. Pugh, 17 Colo. 243; 29 Pac. Rep. 173; Manning v. Strehlow, 11 Colo. 451; 18 Pac. Rep. 625; Burke v. McDonald, 2 Idaho, 646; 33 Pac. Rep. 49; Jackson v. Roby, 109 U. S. 440; Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Wolverton v. Nichols, 119 U. S. 485; 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309.

363. The successful party to an adverse suit is entitled to a patent, the object of the suit being the information of the Land Department. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

364. A verdict on an adverse suit should show whether or not either party is entitled to a patent. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

365. A patent must follow the judgment of the court on a suit brought under the provisions of section 2326, United States Revised Statutes. The Land Department cannot look behind it. Thomas Taylor, 9 C. L. O. 92.

366. The object and purpose of an action under section 2326, United States Revised Statutes, is not only to settle the controversy as between the claimants, but for the information of the officers of the Land Department, and, to recover, either party must show by *proof* the right to a patent; an admission of material facts by the opposing party will not avail, but the facts must be found. Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324.

367. Neither party to an adverse suit is entitled to judgment unless he shows himself to be entitled to a patent by virtue of a com-

pliance with the mining laws. If neither party establishes such a right, the jury must so find, and proceedings in the land office will be stayed. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

368. In an adverse suit, even if the plaintiff offers no testimony, the defendant is not entitled to a judgment unless he affirmatively proves his title. Becker v. Pugh, 17 Colo. 243; 29 Pac. Rep. 173. (First trial, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304.)

369. The rule in ejectment that plaintiff must recover on the strength of his own title, not on the weakness of that of his adversary, is not applicable to suits for possession of mining claims, the question there being which one has the better right. Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 663.

370. On adverse suit a mere general verdict for the defendant, who is in possession, is insufficient to entitle him to a judgment. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

371. In a suit to determine conflicting mining claims to public lands under section 2326, United States Revised Statutes, if there has been no work done by either claimant, plaintiff or defendant, on the premises in controversy, the finding should properly be against both. Jackson v. Roby, 109 U. S. 440.

372. Reversal of judgment on an adverse suit denying the right of either party, on appeal by one party reverses and vacates the entire decision, and the case will be tried *de novo*. Mattingly v. Lewisohn, 35 Pac. Rep. 111.

373. The decision of a court of competent jurisdiction that an adverse claimant has no right, title or interest therein is final as to his rights, and he is estopped from alleging that the land is not mineral in character. Evans v. Rendall, 3 C. L. O. 2.

374. The United States is not a party to a suit based upon an adverse claim filed under the provisions of section 2326, United States Revised Statutes, and is not concluded by any decision rendered on such a suit, the object of which is to try only the right of possession of the parties. (Citing and approving Alice Placer, 4 L. D. 314.) Perego v. Dodge, 163 U. S. 160.

375. A judicial award of the right of possession to an adverse placer claimant as against the applicant for patent for a lode claim does not preclude inquiry by the Land Department on an allegation of the lode claimant that the placer claim, as subsequently applied for, embraces a known lode, where it appears that the question was not tried on the adverse suit; and if such allegation is sustained the lode claimant may make entry of his lode, together with surface ground necessary to the convenient working thereof. Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 28 L. D. 95.

376. The judgment rendered by the court upon an adverse suit is conclusive upon the Land Department only as to the right of possession, and does not relieve the Department from its duty of requiring proof of compliance with law by the adverse claimant. Alice Placer, 4 L. D. 314.

377. In proceedings under section 2326, United States Revised Statutes, the United States is an interested party, and the act of March 3, 1881, directs that the issues shall be found by a jury. Burke v. McDonald, 2 Idaho, 310; 18 Pac. Rep. 351.

378. If the judgment of the court goes beyond the question of possession, it does not bind the Department. Com'r to Seattle Office, Aug. 28, 1893, Orcas Island Lime Placer. (Citing Alice Placer Mine, 4 L. D. 314.)

379. A judgment rendered upon an adverse suit, awarding the land involved to the applicant, does not preclude an investigation by the Land Department as to the claimant's compliance with the law and a rejection of the application for patent if non-compliance is found. Geo. H. Smith (Bull of the Woods Mill Site), 7 L. D. 415.

380. An application for a lode patent was made by A., and B., the owner of a conflicting lode claim, filed an adverse claim and commenced suit thereon, alleging a prior location of the ground in conflict. A. filed an answer, but thereafter amended the survey of his claim by so shortening it as to eliminate from it all conflict with the claim of B., and was allowed to make entry in the land office of the reduced area. He then withdrew his answer, and B., on testimony submitted, secured judgment for the land in controversy. *Held:* (1) That the withdrawal of the answer and abandonment of the application for patent, as to the conflict did not remove the cause from the jurisdiction of the court.

(2) That, in view of the first holding, the judgment is conclusive as between A. and B. of the priority of the location of B. Last Chance M. Co. v. Tyler M. Co., 71 Fed. Rep. 848; 157 U. S. 683.

381. On adverse suit the court has to determine only the right of possession, not the right of either party to a patent. Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

382. A judgment on an adverse suit is not conclusive upon the United States as to the character of the land involved, nor as to the parties' compliance with the law. Apple Blossom Placer v. Cora Lee Lode, 14 L. D. 641.

383. A judgment favorable to an applicant for patent on an adverse suit is no bar to an investigation by the Department as to whether the claimant has complied with the law. Geo. H. Smith, 7 L. D. 415; 10 L. D. 184; Becharts v. Sizer, 12 C. L. O. 166.

384. A hearing to determine the character of land and compliance with law may be ordered after judgment against an adverse claimant. Alice Placer, 4 L. D. 314.

385. From the fact that an adverse claimant obtains judgment in court in his favor, it does not necessarily follow that he is entitled to a patent. Antelope Lode, 2 C. L. O. 2.

386. The judgment of a court on the question of abandonment may be taken into consideration as evidence, but is not conclusive. (Hearing ordered.) Woodville Placer, Sickel's Min. Dec. 89.

387. After judgment on an adverse suit the successful claimant must file a certified copy of the judgment roll with the other evidence required by section 2326, United States Revised Statutes; if suit is dismissed, a certificate of order of dismissal must be filed; a relinquishment of the ground in controversy by applicant, or other proof, will not be accepted in lieu of the above. Circular of July 6, 1883, 2 L. D. 726; par. 89 *et seq.*, Mining Regulations. *Contra*, as to relinquishment of ground by applicant. O. D. Lambard, 3 C. L. O. 194; Ayers v. Daly, 3 C. L. O. 196; Antelope Lode, 2 C. L. O. 2.

388. A successful adverse claimant wishing to enter conflict must file a copy of the judgment roll, plat, field-notes and certificate of improvements as in other cases. (Need not wait for appeal to higher court. Questioned in 10 C. L. O. 167.) Albert F. Harsh, 2 L. D. 706; Noonan v. Caledonia G. M. Co., 10 C. L. O. 167; sec. 2326, U. S. Rev. Stat.; 10 C. L. O. 207, 240.

389. "I apprehend, however, that the successful litigant, under said section (2326), occupies the same position as does an applicant who has given due notice of application, during which no adverse claim has been filed. In each case the rights of the claimant may be lost by abandonment any time prior to entry." Kennedy v. Johnston, Com'r to Leadville Office, Feb. 24, 1896.

390. A successful adverse claimant who has secured a judgment may lose his rights by forfeiture or abandonment of his claim. Steel v. Gold Lead G. & Sm. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

391. Failure of adverse claimants to proceed in accordance with the provisions of sections 2325 and 2326, United States Revised Statutes, gives operation to the rule that such adverse claims have been "adjudicated in favor of the applicant." Pettit v. Buffalo Gold & Silver M. Co., 9 L. D. 563.

392. Judgment by default on adverse suit renders *res judicata* only those facts which must have been proved to support the judgment rendered. Tyler M. Co. v. Sweeney, 54 Fed. Rep. 284; 4 U. S. App. 329; Tyler M. Co. v. Last Chance M. Co., 9 U. S. App. 613; 61 Fed. Rep. 463; 7 U. S. App. 463; 54 Fed. Rep. 284; 157 U. S. 683.

393. A. may apply for a patent for a mining claim, exclusive of a portion thereof involved in an adverse suit brought by him against B., a prior applicant, without thereby waiving any right to the excluded portion, and if, on such suit, the land is awarded to A., he may then make entry of his entire claim, based on his application as to one part, and on his judgment as to the other. Rebellion M. Co., 2 L. D. 542.

394. A mineral entry may be made based in part on a right secured by a judgment, and in part on the possessory right of applicant. Gunnison Crystal M. Co., 2 L. D. 722.

395. A decision of a court of competent jurisdiction, upon a suit based upon an adverse claim against an application for a mineral patent, is reviewable by the higher courts where the amount in controversy is sufficient. Chambers v. Harrington, 111 U. S. 350.

396. A judgment rendered on an adverse suit, awarding the surface of the ground involved to a placer claimant and lodes therein

contained to lode claimants, is without authority of law and will not be followed by the Land Department, which will not issue a patent for a placer claim containing known lodes belonging to one other than the placer claimant. Apple Blossom Placer v. Cora Lee Lode, 14 L. D. 641.

397. A decision of a court of competent jurisdiction that the adverse claimant has no right, title or interest therein is final as to his rights, and he is estopped from alleging that the land is not mineral in character. Evans v. Rendall, 3 C. L. O. 2.

398. Abandonment of surface ground in conflict does not terminate the contest initiated by an adverse claimant, but the judgment of the court must be had on all questions before patent can issue. Ayres v. Daly, 3 C. L. O. 196; O. D. Lambard, 3 C. L. O. 194; Antelope Lode, 2 C. L. O. 2.

399. A judgment is sufficient in matter of description if it names the mining claims involved, and refers to a specific description of the claims contained in the complaint. Haws v. Victoria Copper M. Co., 160 U. S. 303.

400. A mineral entry erroneously allowed pending a suit on an adverse claim may be allowed to stand where the entryman has secured judgment in his favor on such suit. Gunnison Crystal M. Co., 2 L. D. 722.

401. No judgment of a court rendered after the filing of application will be considered binding upon the Land Department save one rendered under the provisions of section 2326, United States Revised Statutes. Nichols v. Becker, 11 L. D. 8.

402. A judgment on a suit brought thirteen months after publication of notice of application for patent is not binding on the Land Department. Seymour v. Wood (Woodville Placer), Sickel's Min. Dec. 211.

403. A judgment on an adverse suit should describe the land as it is described by the verdict upon which it is based. Bushnell v. Crook M. & Sm. Co., 11 Colo. 247; 21 Pac. Rep. 931.

404. Evidence of the dismissal of suit. What must be furnished by the applicant. Circular of July 6, 1883, 2 L. D. 725.

405. An adverse claimant who secures judgment may apply for a patent without waiting for an appeal to a higher court. Noonan v. Caledonia G. M. Co., 10 C. L. O. 167.

406. Where by a final decision on adverse suit it was held that neither party thereto was entitled to any credit for work theretofore done on the claim, before the applicant is allowed to make entry he should show an expenditure of $500 since the trial of said suit. J. D. Rankin, 7 L. D. 411.

407. In case of judgment against applicant for a portion of his claim, he may proceed to secure title to the remainder on showing the requisite amount of expenditures, etc. Rhode Island Lode, Sickel's Min. Dec. 305.

408. Claimant in application who becomes defendant in a suit by an adverse claimant, and who waives his claim, confesses judgment, and acknowledges the superior right of the plaintiff, should not be longer deprived of his patent to that portion to which he is entitled. Morey v. Lombard, Sickel's Min. Dec. 279.

409. The applicant for patent is entitled to enter all ground not affected by the judgment, where the judgment is for but a part of the ground adversely claimed, though entry may not be made until the judgment becomes final. Judgment for all ground adversely claimed may be treated as a final judgment Branagan v. Dulaney, 2 L. D. 750.

410. On determination of an adverse suit, patent may issue to applicant for such portion of the claim as he shall appear from the decision of the court to rightfully possess, if a vein or lode has been discovered therein. Northwestern Lode, 8 L. D. 437.

411. Separate patents may issue for such portions of the claim as adverse parties may possess. Gustavus Hagland (review), 1 L. D. 593.

412. An adverse claimant whose adverse suit has been dismissed will not thereafter be heard to attack the validity of applicant's title. Kannaugh v. Quartette M. Co., 16 Colo. 341; 27 Pac. Rep. 245.

413. When suit on an adverse claim has been dismissed, the plaintiff is no longer entitled to maintain the position of an adverse claimant. Parker v. Thompson, Secretary, July 10, 1881.

414. The dismissal of an adverse suit is a waiver of all adverse rights. Whitman v. Haltenhoff, 19 L. D. 245.

415. An adverse claimant whose suit has been dismissed occupies the same place as

one who fails to adverse. Kannaugh v. Quartette M. Co., 16 Colo. 341; 27 Pac. Rep. 245.

416. In Utah a suit cannot be dismissed by stipulation only; decree of court must follow. Shoo Fly Lode v. Mono Lode, 1 C. L. O. 135.

417. Judgment for possession of a lode does not necessarily carry rights to surface ground. (Rendered prior to the act of 1866.) Bullion M. Co. v. Croesus G. & S. M. Co., 2 Nev. 168; 5 Mor. Min. Rep. 254.

418. Where a court has the jurisdiction it has the right to decide every question which occurs in the case. Elliott v. Piersall, 1 Pet. 340; Iowa M. Co. v. Bonanza M. Co., Sickel's Min. Dec. 288; 6 C. L. O. 75.

419. The Land Department cannot disregard the decisions of the courts. Inimitable Co., Sickel's Min. Dec. 129.

420. If a successful adverse claimant assigns to the applicant, $500 must be shown to have been expended on the conflict so assigned, as the applicant stands only in the shoes of the adverse claimant as to that tract. Jackson M. Co., 3 L. D. 149.

421. If there is a judicial decision that claimant is not entitled to any credit for work done, he must furnish supplemental proof showing the requisite expenditures since date of judgment. J. D. Rankin, 7 L. D. 411.

422. When an adverse claim is regularly presented, and suit begun thereon, the Land Department should take no action that will affect the rights of the parties under the judgment that may be rendered. Moffat v. Compromise Lode, 8 C. L. O. 54.

423. Defendant in an adverse suit may set up title in his answer, and secure judgment declaring him to be the owner if he proves title. Perego v. Dodge, 9 Utah, 8; 33 Pac. Rep. 22.

424. In an adverse suit to determine the right of possession of mining property, a finding by the jury that the plaintiffs did not discover a vein or lode on the disputed premises will be set aside as contrary to the evidence, where there was uncontradicted testimony by plaintiffs that they had sunk a shaft, and had on a certain day discovered a vein or lode, and the indications were sufficient to warrant further work in exploiting it. Walsh v. Mueller, 16 Mont. 180.

425. The provisions of paragraphs 50 and 51, Mining Circular (Circular of December 4, 1884), relative to the establishment of end lines of a survey within excluded claims, are not applicable where the conflict was claimed and applied for, the exclusion being the result of adverse proceedings against the application. In such case an amended survey will not be required. Com'r, June 14, 1895, Instructions to Surveyor General at Denver, Colo.

426. An allegation of an adverse claim upon a proper map is good notice, and if sufficient as a basis for adverse proceedings, the Land Department should await judgment. Robinson v. Mayger, 1 L. D. 588.

8. *General.*

427. An adverse claimant may not file application for ground adversely claimed before suit. Gunnison Crystal M. Co., 2 L. D. 722.

428. An adverse claimant, after suit brought, may not file application for ground adversely claimed (*i. e.*, until after judgment). Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704.

429. An applicant who fails to make entry, although he has made application and publication, must protect himself against a second applicant by filing an adverse. Seaton M. Co. v. Davis, 7 C. L. O. 147.

430. Second applicants who failed to adverse first application, because misled by error of local officers, allowed thirty days to institute suit. Hall v. Street, 3 L. D. 40.

431. A. filed application; B. adversed. Then B. filed application, and A. adversed. B.'s application was improperly allowed and was rejected. Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704.

432. Where the notices of application for patent were sufficiently definite in the matter of description to cause an adverse claim to be filed, republication of notice will not be required because of an error in the survey of ten degrees in the course and three chains in the length of the line connecting the survey of the claim with a corner of the public surveys, but the entry may be referred to the Board of Equitable Adjudication. Walter C. Childs, 10 L. D. 173.

433. In the presence of adverse claimants who have not had legal notice, the omission of connection in the published notice cannot be cured by reference to the Board of Equi-

table Adjudication. Nil Desperandum Placer, 10 L. D. 198.

434. Where entry is made, based as to one portion of the claim on the application, and as to the balance on an assignment from a successful adverse claimant, $500 expenditures must be shown on the latter portion. Jackson M. Co., 3 L. D. 149.

435. A successful adverse claimant, seeking to make entry on a judgment, must file plat, field-notes and certificate of $500 expenditures. Albert F. Harsh, 2 L. D. 706.

436. Entry made by an adverse claimant during pendency of suit subsequently decided in his favor, and acquiesced in by the applicant, allowed to stand. Gunnison Crystal M. Co., 2 L. D. 722.

437. Entry may be allowed for the claim if the adverse claimant files a waiver. (No suit begun.) St. Lawrence M. Co. v. Albion M. Co., 4 L. D. 117; Albion Con. M. Co., 4 L. D. 876; Richmond M. Co. v. Rose, 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7; 114 U. S. 576.

438. Where a mineral entry has been properly canceled, after service upon the claimant of record, the reinstatement thereof rests in the discretion of the General Land Office, and will be denied in the presence of an intervening adverse right. No appeal will lie from such denial. Com'r to Leadville Office, May 14, 1896, *In re* La Plata Blanco Lode.

439. A canceled entry will not be reinstated for the benefit of a transferee guilty of laches in presence of an intervening adverse right. United States v. Hanley, 19 L. D. 186.

440. If a mineral entry has been canceled because of defects in the proofs, it may be reinstated if the record is perfected, in the absence of any intervening adverse rights. Com'r to Denver Land Office, Oct. 10, 1895, *In re* Juno Lode and Mill Site.

441. If an entry is canceled after due service of notice, it will not be reinstated in the face of an intervening relocation of the claim, even if the original requirements were erroneous. Com'r to Leadville Office, June 19, 1896, *In re* Quartzite Lode.

442. A mineral entry canceled without proper notice to the entryman will be reinstated notwithstanding the intervention of an adverse claim by relocation of the ground after the cancellation. McGowan v. Alps Cons. M. Co., 23 L. D. 113.

443. The allowance of mineral entry for land covered by an existing mineral entry is erroneous, but the second may be allowed to stand if the prior entry has been canceled for failure to give proper notice (and, apparently, the first entryman will be given no opportunity to adverse the application of the second entryman). Moss Rose Lode, 11 L. D. 120.

444. A decision of the local office "that the entry is held for cancellation, subject to the right of further appeal," is not, when offered in evidence upon trial of adverse suit, open to objection that it does not cancel, but merely recommends cancellation. The effect of a decision of this kind is not destroyed by the use of such language. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

445. The right to purchase land under a coal declaratory statement is not forfeited, in the absence of a valid adverse claim, by failure to make entry within the statutory period. Alfred Grunsfeld, 10 L. D. 508.

446. Failure to perfect a coal land entry during the statutory period defeats the right so to do in the presence of an intervening adverse claim. O'Gorman v. Mayfield, 19 L. D. 522.

447. Priority of right to purchase coal lands under section 2347, United States Revised Statutes, is lost, in face of an intervening adverse claim, by failure to file upon the lands within the time prescribed by law. Lezeart v. Dunker, 4 L. D. 96.

448. Where an adverse claim is compromised by allowing applicant to secure a patent, and title to both claims becomes vested in one person, he must, as to his right to follow on their dip the lodes found in the conflict, depend upon title to the patented claim. Del Monte M. & M. Co. v. New York & Last Chance M. Co., 66 Fed. Rep. 212. (Follows Flagstaff S. M. Co. v. Tarbet, 98 U. S. 463; 9 Mor. Min. Rep. 607, in the principle that the locator must establish his end line where the lode departs from the assumed course and intersects the side line.)

449. In the absence of surface conflict, there is no adverse claim. Jacques v. Robinson, 7 C. L. O. 50.

450. Persons in possession of the surface embraced in a mining claim, though not claiming the vein or lode, are adverse claimants. Becker v. Central City Town Site, 2 C. L. O. 98.

451. Conflicting rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict. New York Hill Co. v. Rocky Bar Co., 15 C. L. O. 8.

452. A party claiming an equitable right only in a location cannot be considered an adverse claimant. Shoo Fly Lode v. Mono Lode, 1 C. L. O. 135.

453. Parties who have not been properly notified of the forfeiture of their interests must file their adverse claim against an application which omits their names. Grampian Lode, 1 L. D. 544; Monitor Lode, 18 L. D. 358; Gold Dirt Lode, 10 C. L. O. 119; Mattingly v. Lewisohn, 8 Mont. 259; 19 Pac. Rep. 310.

454. A discovery of mineral subsequent to location but before the intervention of adverse claims relates back to and validates the location. Wight v. Tabor, 2 L. D. 738; Branagan v. Dulaney, 2 L. D. 744; James Mitchell, 2 L. D. 752.

455. A discovery after location but before intervention of adverse rights validates the location. Patchen v. Keely, 19 Nev. 404; 14 Pac. Rep. 347; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Zollars & Highland Chief Cons. M. Co. v. Evans, 2 McCrary, 39; 4 Mor. Min. Rep. 407.

456. A discovery after location and before the intervention of an adverse claim will validate the location from the date of discovery. Golden Terra M. Co. v. Smith, 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

457. A discovery within the surface of the claim, though not in discovery shaft, prior to application, validates the location in the absence of an adverse right. Wight v. Tabor, 2 L. D. 741. (On review, 2 L. D. 749.)

458. A location based upon a discovery made upon a prior location may be validated by a relinquishment of the ground including such discovery, by the senior locator, before the intervention of an adverse right. McEvoy v. Hyman, 25 Fed. Rep. 596; 15 Mor. Min. Rep. 397.

459. The validity of a claim is not affected by the fact that as located the end lines were not parallel, if they are made parallel prior to the intervention of adverse rights. Doe v. Waterloo M. Co., 54 Fed. Rep. 935.

460. The fact that as located the end lines of a claim were not parallel does not render the location void, they having been corrected before the intervention of adverse rights. Substantial compliance with the law is all that is required of miners in locating mining claims. Doe v. Sanger, 83 Cal. 203; 23 Pac. Rep. 365.

461. A location may not be amended to the injury of intervening adverse rights. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

462. Acts of location may not be made to relate back to date of original discovery so as to cut off intervening adverse rights. Pelican & Dives M. Co. v. Snodgrass, 9 Colo. 339; 12 Pac. Rep. 206.

463. An original location notice, invalid because of insufficiency of description, is admissible in connection with an amended certificate made before intervention of valid adverse rights. Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 663.

464. An amended location certificate, if made before intervention of adverse rights, will revert back to date of first location, so as to remedy any defects. Craig v. Thompson, 10 Colo. 517; 16 Pac. Rep. 24.

465. An amended location may not be made so as to change the original location to cut off intervening adverse rights. Hall v. Arnot, 80 Cal. 348; 22 Pac. Rep. 200–203.

466. If a location certificate, invalid by error or insufficiency of description, is corrected by an amended certificate (under Colorado statute), the amendment relates back to the date of the original so as to cut off intervening adverse rights. McEvoy v. Hyman, 25 Fed. Rep. 596; 15 Mor. Min. Rep. 397.

467. An amended location certificate relates back to original location in absence of intervening adverse rights. Same of sinking discovery shaft. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

468. If the location notice is recorded before the intervention of an adverse right, though after expiration of the time within which it is required by law to be recorded, the record will be held sufficient. Kramer v. Settle, 1 Idaho, 485; 9 Mor. Min. Rep. 561.

469. A lode is located, but the location certificate is defective for uncertainty. A town site entry is then made. Then the location is amended. Two patents issued. *Held*, that the location, being invalid, might not be amended after the intervention of adverse town site rights. Tombstone Town Site Case, 15 Pac. Rep. 26.

470. Proper marking of a location before the intervention of adverse rights will validate the location from the date of such marking. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

471. The marking of a claim after location and prior to intervention of adverse rights will validate the location. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

472. Mere posting on discovery point, not followed by staking, is of no effect if adverse rights intervene before the claim is marked. Newbill v. Thurston, 65 Cal. 419; 4 Pac. Rep. 409; Patterson v. Tarbell, 26 Oreg. 29; 37 Pac. Rep. 76.

473. Previous to staking the claim it was described in the location notice as running fifteen hundred feet east and west. It was afterwards staked north and south, and the record changed. *Held*, in absence of the intervention of a valid adverse claim, not an invalidation of the location. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

474. Though the Colorado statute requires a location to be completed within three months from date of discovery, the location is valid if it is perfected at any time prior to the intervention of an adverse claim. Faxon v. Barnard, 2 McCrary, 44; 9 Mor. Min. Rep. 515; 1 Colo. Law Rep. 147; 4 Fed. Rep. 702.

475. In the absence of adverse rights, new proof in support of a mineral entry may be made where that submitted is found insufficient. Stork & Heron Placer, 7 L. D. 359; Arie Pinedo, 8 C. L. O. 5; J. D. Rankin, 7 L. D. 411; Soda Springs Sulphur Mine, Sickel's Min. Dec. 81.

476. Prior to the act of August 4, 1892 (27 Stat. 348), there was no authority for the location of land chiefly valuable for building stone under the placer laws, and the passage of said act cannot validate prior locations in the face of an intervening adverse right. Clark v. Ervin, 16 L. D. 122. But see Paris Gibson, 21 L. D. 327.

477. Failure to complete a location within the time allowed by State statute may be excused by the wrongful adverse possession of the claim by third persons. Erhardt v. Boaro, 2 McCrary, 141; 1 Mor. Min. Rep. 452. See S. C., 113 U. S. 527, to same effect.

478. The owner of a mining claim is excused from annual work during the time his claim is held under wrongful adverse possession. Utah M. & Mfg. Co. v. Dickert & Myers Sulphur Co., 6 Utah, 183; 21 Pac. Rep. 1002.

479. The owner of a placer mining claim does not forfeit his right thereto, so as to render it subject to relocation, by a failure to perform the annual assessment work during a time when adverse possession is held by another, where he commences action for its recovery within the statutory time. Trevaskis v. Peard, 44 Pac. Rep. 246 (Cal.).

480. Court proceedings on an adverse claim do not excuse annual expenditures. Clark v. American Flag G. M. Co., 7 C. L. O. 5.

481. Where A. takes possession of mineral land for mining purposes but does not locate it as a claim in accordance with the law, and thereafter B. makes a legal location of the land, A.'s priority of possession will not avail him and B. has the superior right. Horswell v. Ruiz, 67 Cal. 111; 7 Pac. Rep. 197; 15 Mor. Min. Rep. 488; Morenhaut v. Wilson, 52 Cal. 263; 1 Mor. Min. Rep. 58; Chapman v. Toy Long, 4 Sawy. 28; 1 Mor. Min. Rep. 497; McCornick v. Varnes, 2 Utah, 355; 9 Mor. Min. Rep. 505; Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; 3 Mont. 65; Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291; Patterson v. Tarbell, 26 Oreg. 29; 37 Pac. Rep. 76.

482. Plaintiff cannot recover any portion of the ground in dispute by virtue of an attempted adverse prior location made prior to February 28, 1877 (date of opening of Sioux reservation), if defendants were on that day in exclusive possession with the requisite discovery of a vein of valuable minerals, and had performed thereafter every act necessary to constitute and maintain a valid location. Golden Terra M. Co. v. Mahler, 2 Dak. 277; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390.

483. Though a claim to public land may be initiated, under the law, only by a citizen or one who has declared his intention to become one, a subsequent declaration will relate back to date of initiation of his claim, if made before the intervention of any adverse rights. Soustilie v. Lowery, 6 L. D. 15; Jacob H. Edens, 7 L. D. 229; Kirkpatrick v. Brinkman, 11 L. D. 71; Birtch v. Cuddigan, 11 L. D. 121; C. P. R. R. Co. v. Taylor, 11 L. D. 354; Phillips v. Sero, 14 L. D. 568.

484. If an alien locator conveys his claim to a citizen before the attachment of adverse rights, his grantee has good title if he maintains the location. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

485. The defendant, at the date of application for patent, was an alien; his application was adversed, and on the day of trial defendant was naturalized. *Held*, that his act of naturalization could not retroact to his purchase of a possessory right to a mining claim upon the public domain. Wulf v. Manuel, 9 Mont. 279; 23 Pac. Rep. 723. (Reversed, Manuel v. Wulf, 152 U. S. 505.)

486. A grantee of an alien locator who takes possession and does all acts required by law to maintain a location has good possessory title, provided no adverse rights have intervened between the dates of location and of transfer. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

487. A conveyance of a mining claim by a qualified locator to an alien does not operate as an abandonment of the claim, but the alien may hold the claim as against all but the United States; and where the alienage of an applicant is set up by an adverse claimant, the declaration of intention to become a citizen, made by the applicant during the pendency of the adverse suit, but before judgment, will render his title good as far as citizenship is concerned. Manuel v. Wulf, 152 U. S. 505. (Reversing Supreme Court of Montana, 9 Mont. 279; 23 Pac. Rep. 723.) (Citing Man v. Huk, 3 L. D. 452; Ole Krogstad, 4 L. D. 564; Lord v. Perrin, 8 L. D. 536; Jackson v. Beach, 1 Johns. Cases, 399; Governeur v. Robertson, 11 Wheat. 332; Osterman v. Baldwin, 6 Wall. 116.)

488. Adverse rights must be protected in the manner prescribed by section 2326, United States Revised Statutes, or held to be waived in absence of fraudulent concealment by the applicant. Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77. (Affirmed, 18 Colo. 174; 22 Pac. Rep. 486.)

489. An adverse claim will be held as adjudicated in applicant's favor if not asserted in the manner and within the period provided by the statute. Petit v. Buffalo G. & S. M. Co., 9 L. D. 563: Independence Lode, 9 L. D. 572.

490. The silence of the first locator when a subsequent locator applies for patent is, under the statute, a waiver of his priority. Chapman v. Toy Long, 4 Sawy. 28; 1 Mor. Min. Rep. 497; Gustavus Hagland, 1 L. D. 591; Warren Mill Site v. Copper Prince Lode, 1 L. D. 555.

491. Failure to prosecute an adverse, or in any other manner assert a right against a known pending application, is conclusive as against the existence of any adverse rights. Nichols v. Becker, 11 L. D. 8.

492. All adverse rights will be held to be adjudicated in applicant's favor if not protected according to law. Snow Flake Lode, 4 L. D. 30; Petit v. Buffalo G. & S. M. Co., 9 L. D. 563.

493. Where the owner of the original location fails to adverse the application for patent on the junior location, it must be assumed, under section 2325, United States Revised Statutes, that the claimant under the junior location is entitled to a patent as against the claim of the prior locator. Branagan v. Dulaney, 2 L. D. 744; Orient *et al.* Lodes, 7 C. L. O. 51.

494. Whatever is fundamental to the possession and right of possession of a mining claim is remitted to the courts, and parties who fail to set up an adverse claim to an application regularly made cannot protect their rights by a protest submitted to the Land Department. T. M. Empy, 10 C. L. O. 102.

495. Adverse claimants who fail to protect their rights in the manner prescribed by law will be treated as protestants. Juniper Mine, 4 C. L. O. 114.

496. Proceedings necessary to acquire a mineral patent are in the nature of a proceeding *in rem*, and are binding upon the world so far as concerns claims adverse to that of the applicant. Hamilton v. Southern Nevada

G. & S. M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314.

497. In the absence of an adverse claim, no agreement between parties can affect the statutory assumption that the applicant is entitled to a patent. Relief from non-performance of such agreement must be sought in court. Gustavus Hagland, 1 L. D. 591.

498. When an adverse has been filed and suit brought thereon, the Land Department will not consider the case on the merits until final determination of the suit. Ovens v. Stephens, 2 L. D. 699; Chambers v. Pitts, 3 C. L. O. 162.

499. The General Land Office will pass upon the protest of the adverse claimant. Iola Lode, 1 L. D. 539.

500. A. and B. own cross-lodes, A. being the prior locator. B. applies for patent. By failing to adverse, A. loses his right to the surface, and to the lode at the point of intersection, but does not lose the remainder of his lode. A. has the right of way through to work his lode. Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77. (Affirmed, 13 Colo. 174; 22 Pac. Rep. 436.) Branagan v. Dulaney, 8 Colo. 408; 8 Pac. Rep. 669; Morgenson v. Middlesex M. & M. Co., 11 Colo. 176; 17 Pac. Rep. 513. *Contra*, Watervale M. Co. v. Leach, 33 Pac. Rep. 418 (Arizona); Wilhelm v. Sylvester, 101 Cal. 358; 35 Pac. Rep. 997.

501. In case of failure to adverse, only cross-veins and those uniting on the dip with the one patented are excepted from the patent. Lee v. Stahl, 13 Colo. 174; 22 Pac. Rep. 436. (Affirming S. C., 9 Colo. 408; 11 Pac. Rep. 77.)

502. When mining claims intersect, the rights of owners depend upon the actual intersections of the veins, and priority of initiation of rights. Camp Bird Lode, Sickel's Min. Dec. 246.

503. The fact that a location is based upon a discovery within a prior location does not, *proprio vigore*, invalidate the second location. as, if application is made therefor and no adverse claim is filed, it is conclusively presumed that the first locator had no right to the ground common to the two locations. Branagan v. Dulaney, 2 L. D. 744.

504. An adverse claimant against whom judgment has been given in a court of competent jurisdiction is estopped from setting up the allegation of the non-mineral character of the land. Evans v. Rendall, 3 C. L. O. 2.

505. Decisions of the Land Department are not binding on courts in actions for the settlement of adverse claims brought under section 2326, United States Revised Statutes. Hartman v. Smith, 7 Mont. 19; 14 Pac. Rep. 648.

506. In the absence of an adverse claim it will be presumed that a lode exists in land covered by a regularly located lode mining claim. Apple Blossom Placer v. Cora Lee Lode, 21 L. D. 438.

507. Where application for a placer patent was made and no adverse claim filed by a lode claimant, and subsequently the lode claimant applied for patent and was adversed by the placer applicant, who began suit and then dismissed it, it was held that the placer applicant had abandoned the conflict, and that patent for the lode claim need not be confined to twenty-five feet on each side of the middle of the lode. Monroe Lode, 4 L. D. 273.

508. The locator of a lode claim who fails to adverse an application for a placer claim covering the same, by such failure loses his rights to surface ground in excess of twenty-five feet on each side of the middle of his lode. Shonbar Lode, 3 L. D. 388. (Modified in South Star Lode, 20 L. D. 204.)

509. Where a lode claim conflicts with a placer, the lode discovery being outside of the conflict, there is no presumption of the continuation of the lode into the placer ground. (Raunheim, placer claimant, filed application for patent and gave notice. Dahl, lode claimant, did not adverse. Hence Dahl is estopped from questioning the validity of the placer claim.) Raunheim v. Dahl, 6 Mont. 167; 9 Pac. Rep. 892; 132 U. S. 260.

510. The failure of adverse claimant to prosecute his claim with reasonable diligence is a waiver of the same. Clark v. Calkins, 3 C. L. O. 98; Iowa M. Co. v. Bonanza M. Co., 6 C. L. O. 75.

511. An adverse claimant must use reasonable diligence. J. S. Wallace, 1 L. D. 582.

512. The question of diligence in the prosecution of an adverse suit is one for the determination of the court. Iowa M. Co. v. Bonanza M. Co., 6 C. L. O. 75.

513. Statutory proceedings should be strictly followed. Lee Doon v. Tesh, 6 Pac. Rep. 97.

514. All questions of location and maintenance thereof, involved in the decision of adverse claims, are to be decided by the courts. Ovens v. Stephens, 2 L. D. 699; Branagan v. Dulaney, 2 L. D. 744; Southwestern M. Co., 4 L. D. 271; Bay State G. M. Co. v. Trevillion, 10 L. D. 194.

515. All questions concerning the proper location and maintenance thereof must be left to the courts. Branagan v. Dulaney, 2 L. D. 744.

516. The date of a location set up by an adverse claimant and the competency of a corporation under State laws to make such location, are questions of title and properly matters for the courts. Bay State G. M. Co. v. Trevillion, 10 L. D. 194.

517. The only questions before the courts in mining application contests is the right of possession to the premises in dispute. Antelope Lode, 2 C. L. O. 2.

518. As the court has exclusive jurisdiction over mining suits, errors can only be corrected by the proper appellate tribunal. Iola Lode, 1 L. D. 539.

519. The mining laws recognize and continue the jurisdiction of courts to determine adverse claims. Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584.

520. Any right which cannot be recognized by the Land Department by reason of failure to file an adverse claim must be protected in a court of equity. Seymour v. Wood, 4 C. L. O. 2.

521. Where adverse relocations are made prior to the application for patent, controversies as to the right of possession must be settled by the courts. Where the alleged abandonment occurred subsequent to publication and prior to payment and entry, the Department must take action. Com'r to Sacramento Office, Oct. 21, 1880.

522. After an adverse claim has been regularly alleged, it is not the duty of the land office to inquire into the merits of the case, that being solely within the jurisdiction of the proper court. Eldred v. Lasey, 6 C. L. O. 34.

523. The question of the relative rights of town site and mineral claimants must be left to the courts. Rico Town Site, 1 L. D. 556.

524. Adverse rights must be determined in court. Rico Town Site, 1 L. D. 556; Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584.

525. A plaintiff in a suit based upon an adverse claim must show possessory title to the premises not only as against the defendant but against the United States. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

526. In order to ascertain which party is entitled to a mining patent, it is only necessary to determine which party, at the time of its issue, was the rightful owner of the mining claim in question, as against everybody but the United States, under the laws, rules, customs and decisions of courts in force at the time in the locality embracing it. 420 M. Co. v. Bullion M. Co., 9 Nev. 240; 3 Sawy. 634; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

527. The plaintiff, in an action of ejectment between the owners of conflicting mining claims, must prove a discovery in his discovery shaft, and that the lode there discovered extends to the ground in conflict. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

528. When plaintiff's ownership and right of possession are put in issue by the answer, he must show affirmatively compliance with the act of Congress and with local rules and regulations, and that he had thereby made a valid location. Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291.

529. The policy of the law is to require all rights and equities in the premises sought to be purchased and patented to be adjusted prior to the issuance of patent, to the end that it may be impregnable against all comers. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; 420 M. Co. v. Bullion M. Co., 3 Sawy. 634; 1 Mor. Min. Rep. 114; 9 Nev. 240; 11 Mor. Min. Rep. 608; Eureka Cons. M. Co. v. Richmond M. Co., 4 Sawy. 302; 9 Mor. Min. Rep. 578: Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77; 13 Colo. 174; 22 Pac. Rep. 436: Golden Fleece G. & S. M. Co. v. Cable Cons. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

530. The doctrine of *res adjudicata* should be rigorously applied to the litigation brought to test the right to the issue of a patent. 420 M. Co. v. Bullion M. Co., 9 Nev. 240; 3 Sawy. 634; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

531. All adverse claims are barred by the issuance of patent. Raunheim v. Dahl, 6 Mont. 167; 9 Pac. Rep. 893. (See S. C., 132 U. S. 260.) Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

532. Patent relates back to location so as to cut off intervening adverse rights. Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858.

533. Suit to vacate a mineral patent will not be recommended by the Land Department when petition therefor is based upon allegations of an adverse claim which might have been properly asserted. Thomas Starr, 2 L. D. 759.

534. The patentee of a mining claim may be declared trustee for one who failed to adverse, if such failure was caused by fraud on the part of the patentee. Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240.

535. Failure to adverse (by agreement) does not make the patentee trustee for the one so filing. Ducie v. Ford, 138 U. S. 587; 8 Mont. 233.

536. Until patent issues the legal title is in the United States. Therefore, a town lot owner claiming adversely to a mining claimant cannot set up the Statute of Limitations as having begun to run before patent issued on the mining claim. King v. Thomas, 12 Pac. Rep. 865; Mayer v. Carothers, 36 Pac. Rep. 182.

537. The Statute of Limitations of Nevada constitutes a part of the local laws by which the rights between an applicant for patent and an adverse claimant are to be determined. 420 M. Co. v. Bullion M. Co., 9 Nev. 240; 3 Sawy. 634; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

538. An adverse claim may not be asserted under the Statute of Limitations after mineral entry has been made. Rader v. Allen, 27 Oreg. 344; 41 Pac. Rep. 154.

539. Proof of title under the Statute of Limitations as provided by section 2332, United States Revised Statutes, may be submitted where patent is sought either for lode or placer claims. Circular, June 8, 1883, 2 L. D. 725.

540. The title of a mineral claimant may be questioned only by one claiming adversely. Lorenz v. Waldron, 96 Cal. 243; 31 Pac. Rep. 54.

541. One having no title to a mining claim will not be heard to attack the title of another thereto. Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

542. Neither party in an adverse suit can gain rights by acts performed subsequent to the filing of the adverse claim. Moxon v. Wilkinson, 2 Mont. 421; 12 Mor. Min. Rep. 602.

543. A protestant who alleges an adverse interest is entitled to the right of appeal. Northwestern Lode, 8 L. D. 437.

544. Protestants have no right of appeal in the absence of an adverse claim. Secretary, July 21, 1879; Kemp v. Starr, 6 C. L. O. 3.

545. Only applicants for patents for mining claims and adverse claimants can be parties to an action in court under sections 2325 and 2326, United States Revised Statutes. Mont Blanc Cons. Gravel M. Co. v. De Bour, 61 Cal. 364; 15 Mor. Min. Rep. 286; 9 C. L. O. 205.

546. An adverse claimant is not barred from asserting his claim by the allowance of entry without legal notice of application for patent, and where he sets up such an allegation of non-compliance with law in a protest, he has such an interest as entitles him to appeal from the action of the General Land Office dismissing his protest. Bright v. Elkhorn M. Co., 8 L. D. 122.

547. A notice of application for a mineral patent that fails to connect the claim with the public surveys or a United States mineral monument is insufficient, and the entry allowed on such notice may not be referred to the Board of Equitable Adjudication, in the presence of the protest of persons alleging adverse claims, but republication of notice will be required. Nil Desperandum Placer, 10 L. D. 198.

548. Where the survey of a mining claim and the published notice based thereon are erroneous in describing the claim as being in a county other than the one in which it is situate, to the injury of adverse claimants, an amended survey and republication will be required. Henry v. Castner, 17 L. D. 565.

549. Republication of notice of application for patent must be accompanied by posting of notice in the local land office, and of notice and plat upon the claim, as in the first instance, with the same rights to adverse claimants. American Flag Lode, 6 L. D. 320.

550. To bar the rights of adverse claimants notice of application must be given for sixty days, concurrently, by publication, post-

ing on the claim and in the land office. Tilden v. Intervenor M. Co., 1 L. D. 572.

551. An error in the description, making the published notice inconsistent with itself, should put an adverse claimant on his guard, and will not be deemed fatal unless it is capable of misleading. Equator M. & Sm. Co., 2 C. L. O. 114.

552. A defaulting adverse claimant may protest that the law has not been complied with. McMurdy v. Streeter, 1 C. L. O. 34.

553. A locator has all lodes, the apexes of which are inside his location, to which no adverse right had attached at the date of his location. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

554. A peculiar relocation of a mining claim considered and held to be an adverse claim. Ophelia Pope Lowe (review), 9 C. L. O. 192.

555. An adverse location made on a legal holiday questioned. McNeill v. Pace, 8 L. D. 267.

556. An adverse locator must show abandonment of the prior location affirmatively. Coleman v. Curtis, 12 Mont. 301; 30 Pac. Rep. 266.

557. The applicant for patent cannot waive an adverse claim by excluding from his application the area covered by the adverse claim, and so vest the Land Department with jurisdiction to patent the remaining portion of his claim. The adverse claim can be waived only by the one setting it up. But if the Land Department does so proceed there is no cause of complaint by the adverse claimant, and it is only a question between the Land Department and the applicant for patent. Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683. (Reversing Ct. Ct. of Appeals, 7 U. S. App. 468; 54 Fed. Rep. 284; 9 U. S. App. 613; 61 Fed. Rep. 557.) Antelope Lode, Sickel's Min. Dec. 169. *Contra*, O. D. Lambard, 3 C. L. O. 194; Sacramento M. Co. v. Last Chance No. 2 Lode, 3 C. L. O. 66.

558. A waiver of an adverse claim is effective when filed in the local office, without reference to pending suits. St. Lawrence M. Co. v. Albion Cons. M. Co., 4 L. D. 117; Albion Cons. M. Co., 4 L. D. 376.

559. An applicant for a mineral patent may make entry of his claim exclusive of land covered by an adverse claim and take patent for the land not in conflict, without waiving his possessory right to the excluded portion. Black Queen Lode v. Excelsior No. 1 Lode, 22 L. D. 343.

560. A mineral claimant may temporarily exclude part of his claim from his application to purchase and entry without waiving his right thereto, if such exclusion be caused by assertion of adverse rights. Aspen Cons. M. Co., 22 L. D. 8. (Citing Branagan v. Dulaney, 2 L. D. 744.)

561. The exclusion from an application for patent of a portion of the claim which is included in a prior application, and against which the second applicant has filed an adverse, does not amount to an abandonment. Rebellion M. Co., 8 C. L. O. 105.

562. If an adverse claim is filed against an application for patent for two contiguous claims, directed against only one of said claims, the applicant may take entry of the claim not covered by the adverse. Com'r to Marysville, Cal., Office, July 10, 1896.

563. A waiver of an adverse by the party making the first application is a waiver of no right under the application. Iron Queen Lode v. Codfish Balls Lode, Com'r, July 14, 1882.

564. Parties with conflicting claims may effect a compromise, but such agreements cannot be recognized by the Land Department unless held equivalent to a judgment of a court. D. D. Belden, 9 C. L. O. 51.

565. Withdrawal of adverse, compromise forms for. Parley's Park S. M. Co. v. Kerr, 130 U. S. 256.

566. An adverse claimant may show abandonment of any one of several locations embraced in an application. Good Return M. Co., 4 L. D. 221.

567. An application for a patent for a mining claim withdraws the same from further application, and the conflicting claimant can only protect his right by adverse. Com'r to Montgomery Blair, Sept. 27, 1880.

568. In case of an amicable adjustment of adverse interests, a survey will be required to show the compromise line and the exterior boundaries. Com'r, Aug. 18, 1874.

569. A discrepancy between an adverse claim as filed and accepted in the local office, and that upon which suit is instituted, will not warrant resumption of proceedings by the

Land Department during the pendency of the suit in court. Bay State G. M. Co. v. Trevillion, 10 L. D. 194; Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391.

570. A difference in the name (apparently through clerical error) of the adverse claimant as presented in the adverse claim filed in the local office, and as shown by proceedings in court, will not warrant the dismissal of the adverse by the Land Department. Bay State G. M. Co. v. Trevillion, 10 L. D. 194.

571. An adverse claim may be filed on Sunday or out of office hours if the local land officers are willing to receive it. Sayer v. Hoosac Cons. G. & S. M. Co., 6 C. L. O. 78.

572. An adverse which is bad on general demurrer should be rejected. City Rock Lode v. King of the West Lode, 1 C. L. O. 146.

573. An adverse claim was rejected because the adverse location was made a few days prior to the expiration of published notice, and because the allegations did not properly constitute an adverse claim. Smead v. Deadwood M. Co., 7 C. L. O. 50. *Contra*, Ovens v. Stephens, 9 C. L. O. 190.

574. Instructions as to adverse claims. Circular, Dec. 10, 1880, 9 C. L. O. 148; Circular, June 8, 1888, 10 C. L. O. 191.

575. An appeal will properly lie from the rejection of an adverse claim. Waterhouse v. Scott, 13 L. D. 718.

576. Fees for filing an adverse are not required if the adverse is rejected. Waterhouse v. Scott, 13 L. D. 718.

577. If a successful adverse claimant assigns the ground in conflict to applicant, $500 must be shown to have been expended on the conflict. Jackson M. Co., 8 L. D. 149.

578. The survey of an adverse claim is not required by the law or official regulations to be authorized by or to receive the approval of the Surveyor General. Com'r to Theodore Wagner, May 10, 1881.

579. Certificate of the clerk of the district court that no suit is pending involving the claim filed in lieu of the judgment roll is satisfactory. Gold Blossom Quartz Lode, 11 C. L. O. 100.

580. Mining of a claim may be temporarily restrained pending settlement of controversy as to title in a court of law. Bishop v. Baisley, 41 Pac. Rep. 986.

581. Papers in a case may be returned to the local officers to be produced in court. Moffat v. Compromise Lode, 8 C. L. O. 54.

582. Applicants have the right to examine all protests and adverse claims filed in the local office. Papers cannot be removed from the office. Com'r to Salt Lake Office, April 4, 1873.

583. "The strict rule of pleading which formerly required exact accuracy in the description of premises sought to be recovered (on adverse suit) has, in modern practice, been relaxed, and a general description of the property held to be good. The provisions of state statutes as to the description of the premises by metes and bounds have been held to be only directory, and a description by name where the property is well known is often sufficient." Glacier Mountain S. M. Co. v. Willis, 127 U. S. 471.

584. A. and B. claim the same vein under conflicting locations. A verbal agreement was made that A. should obtain patent and convey a one-half interest to B., the expense to be borne equally. On suit to compel specific performance, such agreement held to be within the Statute of Frauds; that relinquishing disputed possession and simply refraining from filing an adverse claim constituted no part-performance, and that even a part payment of the share of expenses of patent could not avail plaintiff, for the reason that there was no such mutuality of obligation in the agreement as would have enabled the defendant to compel such payment had the plaintiff seen fit to refuse it. Ducie v. Ford, 8 Mont. 233; 138 U. S. 587.

585. After application for patent and publication of notice thereof and before entry, a claim may be relocated for abandonment, and upon a showing of such abandonment and relocation the application will be canceled if no adverse claim, or suit based on an adverse claim, is pending against said application. Continental G. & S. M. Co. v. Gage, 10 L. D. 534.

586. Where, after publication of notice of application for patent and before entry, a mining claim is relocated by a stranger, for failure on part of the applicant to make the required annual expenditure, and such failure and relocation are shown at a hearing, the entry will be canceled and the parties left to litigate their conflicting claims in

court. The Land Department will not pass upon the validity of the relocation in such a case. Little Pauline Lode v. Leadville Lode, 7 L. D. 506.

RELATION AND ADJUSTMENT OF LODE CLAIMS TO PUBLIC SURVEYS.

I. THE STATUTE.
II. REGULATION.
III. DECISIONS.

I. THE STATUTE.

The description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim. 17 Stat. 94; 19 Stat. 52; sec. 2327, U. S. Rev. Stat.

II. REGULATION.

46. Upon the approval of the survey of a mining claim made upon surveyed lands, the surveyor-general will prepare and transmit to the local land office and to this office a diagram tracing showing the portions of legal 40-acre subdivisions made fractional by reason of the mineral survey, designating each of such portions by the proper lot number, beginning with No. 1 in each section and giving the area of each lot.

III. DECISIONS.

(See SURVEY, p. 137.)

ENLARGEMENT OF RIGHTS.

Applications for patents for mining-claims under former laws now pending may be prosecuted to a final decision in the General Land Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining-claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two. 17 Stat. 94; 19 Stat. 52; sec. 2328, U. S. Rev. Stat.

PLACERS.

I. THE STATUTES.
II. REGULATIONS.
III. DECISIONS.
1. *Definition.*
2. *Location.*
3. *Expenditure.*
4. *Lode.*
5. *General.*

I. THE STATUTES.

Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. 16 Stat. 217; sec. 2329, U. S. Rev. Stat.

Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer-claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser. 16 Stat. 217; sec. 2330, U. S. Rev. Stat.

Where placer-claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes. 17 Stat. 94; 19 Stat. 52; sec. 2331, U. S. Rev. Stat.

Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made

for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof. 17 Stat. 94; 19 Stat. 52; sec. 2333, U. S. Rev. Stat.

II. Regulations.

Under sec. 2329.

52. The proceedings to obtain patents for claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where said placer claim shall be upon surveyed lands, and conforms to legal subdivisions, no further survey or plat will be required, and all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public-land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands. But where such claims are located previous to the public surveys, and do not conform to legal subdivisions, survey, plat, and entry thereof may be made according to the boundaries thereof, provided the location is in all respects legal.

53. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here, it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims, placer claims being fixed, however, at two dollars and fifty cents per acre, or fractional part of an acre.

62. The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that where placer claims are upon *surveyed* public lands the locations must hereafter be made to conform to legal subdivisions thereof as near as practicable.

63. The first care in recognizing an application for patent upon a placer claim must be exercised in determining the exact classification of the lands. To this end the clearest evidence of which the case is capable should be presented.

(1) If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs; if of mixed placers and lodes, it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333, Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

(2) Section 2395, Revised Statutes (subdivision 7), requires the surveyor to "note in his field books the true situation of all mines, salt licks, salt springs, and mill seats which come to his knowledge;" also "all water-courses over which the lines he runs may pass." It further requires him to "note the quality of the lands." These descriptive notes are required by subdivision 8 to be incorporated in the plat by the surveyor-general.

(3) If these duties have been performed, the public surveys will furnish a reasonable guide to the district officers and to claimants in prosecuting their applications. But experience has shown that great neglect has resulted from inattention to the law in this respect, and the regular plats are of very little value in the matter. It will, therefore, be required in the future that deputy surveyors shall, at the expense of the parties, make full examination of all placer claims surveyed by them, and duly note the facts as specified in the law, stating the quality and composition of the soil, the kind and amount of timber and other vegetation, the locus and size of streams, and such other matters as may appear upon the surface of the claim. This examination should include the character and extent of all surface and underground workings, whether placer or lode, for mining purpose.

(4) In addition to these data, which the law requires to be shown in all cases, the deputy should report with reference to the proximity of centers of trade or residence; also of well-known systems of lode deposit or of individual lodes. He should also report as to the use or adaptability of the claim for placer mining; whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose; and, finally, what works or expendi-

tures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(5) This examination should be reported by the deputy under oath to the surveyor-general, and duly corroborated; and a copy of the same should be furnished with the application for patent to the claim, constituting a part thereof, and included in the oath of the applicant.

(6) Applications awaiting entry, whether published or not, must be made to conform to these regulations, with respect to examination as to the character of the land. Entries already made will be suspended for such additional proofs as may be deemed necessary in each case.

Under sec. 2330.

54. By section 2330, authority is given for the subdivision of forty-acre legal subdivisions into *ten-acre* lots, which is intended for the greater convenience of miners in segregating their claims both from one another and from intervening agricultural lands.

55. It is held, therefore, that under a proper construction of the law these ten-acre lots in mining districts should be considered and dealt with, to all intents and purposes, as legal subdivisions, and that an applicant having a legal claim which conforms to one or more of these ten-acre lots, either adjoining or cornering, may make entry thereof, after the usual proceedings, without further survey or plat.

56. In cases of this kind, however, the notice given of the application must be very specific and accurate in description, and as the forty-acre tracts may be subdivided into ten-acre lots, either in the form of squares of ten by ten chains, or if [of] parallelograms five by twenty chains, so long as the lines are parallel and at right angles with the lines of the public surveys, it will be necessary that the notice and application state specifically what ten-acre lots are sought to be patented, in addition to the other *data* required in the notice.

57. Where the ten-acre subdivision is in the form of a square it may be described, for instance, as the "SE. ¼ of the SW. ¼ of NW. ¼," or, if in the form of a parallelogram as aforesaid, it may be described as the "W. ½ of the W. ½ of the SW. ¼ of the NW. ¼ (or the N. ½ of the S. ½ of the NE. ¼ of the SE. ¼) of section ——, township ——, range ——," as the case may be; but, in addition to this description of the land, the notice must give all the other *data* that is required in a mineral application, by which parties may be put on inquiry as to the premises sought to be patented. The proofs submitted with applications for claims of this kind must show clearly the character and the extent of the improvements upon the premises.

Inasmuch as the surveyor-general has no duty to perform in connection with the entry of a placer claim of legal subdivisions, the proof of improvements must show their value to be not less than *five hundred dollars* and that they were made by the applicant for patent or his grantors. The annual expenditure to the amount of $100, required by section 2324, Revised Statutes, must be made upon placer claims as well as lode claims.

59. By section 2330, it is declared that no location of a placer claim, made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

Under sec. 2331.

60. Section 2331 provides that all placer-mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States systems of public surveys and the subdivisions of such surveys, and no such locations shall include more than twenty acres for each individual claimant.

61. The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location made by an individual can exceed twenty acres, and no location made by an association of individuals can exceed one hundred and sixty acres, which location of one hundred and sixty acres cannot be made by a less number than eight *bona fide* locators; and no local laws or mining regulations can restrict a placer location to less than twenty acres, although the locator is not compelled to take so much.

Under sec. 2333.

58. Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent, and in all the notices. But in all cases whether the lode is claimed or excluded, it must be surveyed and marked upon the plat; the field notes and plat giving the area of the lode claim or claims and the area of the placer separately. It should be remembered that an application which omits to include an application for a known vein or lode therein, must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses.

III. Decisions.

1. *Definition.*

1. Placers are all forms of deposits excepting veins or lodes of rock in place. Sec. 2329, U. S. Rev. St.

2. "By the term 'placer claim,' * * * is meant ground within defined boundaries which contains mineral in its earth, sand or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling." United States v. Iron Silver M. Co., 128 U. S. 673. (Affirming S. C., 24 Fed. Rep. 568.)

3. Placer mines are those in which minerals are found in the softer material which covers the earth's surface, and not among the rocks beneath. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

4. Placers "are superficial deposits which occupy the beds of ancient rivers or valleys," or deposits of valuable mineral, found in particles in alluvium or diluvium, or in the beds of streams. Com'r to C. D. Richardson, Sept. 7, 1892. (Citing Moxon v. Wilkinson, 2 Mont. 421; 12 Mor. Min. Rep. 602.)

5. A "mineral lode," as the term is used by miners and the mining acts of Congress, is a zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock, but does not include a deposit of gold-bearing gravel, although the same may lie between clearly defined strata of rock, and have an average drop of several degrees. Such a deposit of gravel is a placer, as that term is used by miners and in section 2329, United States Revised Statutes. Gregory v. Pershbaker, 73 Cal. 109; 14 Pac. Rep. 401; 15 Mor. Min. Rep. 602.

6. The following deposits are enterable under the placer mining laws (for decisions, see Minerals): Agate, albertite, alkaline earths, alum, amygdaloid bands, asphaltum, auriferous cement, auriferous clay, black lead, borax, carbonate of soda, china clay, fire clay, diamonds, fahlbands, gilsonite, graphite, gypsum, iron, isinglass, kaolin, limestone, stone, marble, mica, nitrate of potash, nitrate of soda, opal, oil, plumbago, phosphates, potash, slate, soda, stockwerke, building stone, sand stone, sulphur and umber.

7. Placer locations, under section 2329, United States Revised Statutes, may include all forms of deposit except quartz veins or other rock in place, and the Land Department has properly held that said section embraces quarries of rock valuable for building purposes. Freezer v. Sweeney, 8 Mont. 508; 21 Pac. Rep. 20.

8. The act of August 4, 1892 (27 Stat. 348), authorizes a placer entry of land chiefly valuable for building stone. Minnekahta Stone Mine, 15 L. D. 256.

9. Land containing valuable deposits of building stone is enterable under the placer laws. H. P. Bennett, Jr., 3 L. D. 116. But see *contra*, Conlin v. Kelly, 12 L. D. 1.

10. Land containing stone suitable for the manufacture of lime is enterable under the placer laws. Shepherd v. Bird, 17 L. D. 82.

11. A placer location of land containing building stone was made in 1889. A pre-emption declaratory statement was filed by a settler the same year. In 1891 deposits of fire clay were alleged to have been discovered. *Held*, that as the placer location was based upon a discovery of building stone, without legal warrant, the subsequent discovery of fire clay would not defeat the agricultural claim. (Note.—The real reason for the decision was probably failure to prove existence of valuable deposits of fire clay.) Clark v. Ervin, 17 L. D. 550.

12. Land valuable for building stone entered as a placer under then existing Departmental practice is excepted from a grant of school lands to the State. Paris Gibson, 21 L. D. 327.

13. Lands chiefly valuable for deposits of fire clay or kaolin are enterable under the placer laws. Dobbs Placer, 1 L. D. 565.

14. Land containing deposits of fire clay is enterable under the placer laws. Clark v. Ervin, 17 L. D. 550.

15. Land valuable for petroleum is enterable under the placer mining laws. A. A. Dewey, 9 C. L. O. 51. *Contra*, Union Oil Co., 23 L. D. 222.

16. Veins of clay or non-metalliferous substance are subject to entry as placers. Montague v. Dobbs, 9 C. L. O. 165; S. C., Dobbs Placer, 1 L. D. 565.

17. A "deposit of mineral paint rock *in place*" is not subject to placer entry. (No

opinion is expressed as to whether paint rock is a mineral.) Charles A. Barnes, 7 L. D. 66.

18. Land, to be enterable under the mineral land law, must be shown to contain mineral in such quantities as will render profitable the working of the claim. It must, under the placer law, contain a valuable deposit. Royal K. Placer, 13 L. D. 86.

19. Land, to be subject to entry under the placer law, must be shown to be placer mining land as a present fact. Searle Placer, 11 L. D. 441.

20. A gravel deposit or stratum, even between well-defined walls and having an incline or dip, is not a lode. Gregory v. Pershbaker, 73 Cal. 109; 14 Pac. Rep. 401; 15 Mor. Min. Rep. 602.

2. *Location.*

(See LOCATION, p. 77.)

21. Marking of the boundaries on the ground is essential to the validity of a location of a placer mining claim. (NOTE.—In this case the claim was not taken by legal subdivisions.) Sweet v. Webber, 7 Colo. 443; 4 Pac. Rep. 752; 4 West Coast Rep. 116.

22. A placer location, even though taken by legal subdivisions, is required by law to be staked or marked on the ground. Gregory v. Pershbaker, 73 Cal. 109; 14 Pac. Rep. 401; 15 Mor. Min. Rep. 602; White v. Lee, 78 Cal. 593; 21 Pac. Rep. 363; Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419. *Contra:* A placer location taken by legal subdivisions need not be staked. Reins v. Murray, 22 L. D. 409.

23. A location of a placer claim by legal subdivisions is valid, even though the subdivisions located are erroneously described in the location notice, providing the abutting legal subdivisions are correctly given. Duryea v. Boucher, 28 Cal. 569; 67 Cal. 141; 7 Pac. Rep. 421.

24. The staking of every twenty acres of placer claim is not required, the claim being an entirety. Com'r to Aaron F. Parker, April 12, 1893; McDonald v. Montana Wood Co., 35 Pac. Rep. 668.

25. A location of a placer claim by legal subdivisions must be made to conform therewith in the matter of exact description of the land as shown by the township plat. Fractional subdivisions designated by the United States Surveyor General as lots must be so described. Reins v. Murray, 22 L. D. 409.

26. The location of a placer claim, using the names of persons as co-locators who are not intended to have any real interest, but who are to convey their rights after location, (commonly called "dummy" locators), is a fraud on the government. Mitchell v. Cline, 84 Cal. 409; 24 Pac. Rep. 164.

27. A placer location made by A., B. and C. in their own names, but for the use of a corporation, may cover that area which the corporation might locate, viz.: twenty acres. Gird v. California Oil Co., 60 Fed. Rep. 531.

28. A discovery of mineral is not a prerequisite to a location of a placer mining claim. Gregory v. Pershbaker, 73 Cal. 109; 14 Pac. Rep. 401; 15 Mor. Min. Rep. 602.

29. A location of a placer claim must be based on a discovery of a valuable mineral deposit. Reins v. Murray, 22 L. D. 409.

30. Where more than twenty acres is embraced in a placer location, the claim is an entirety, and a discovery upon every twenty acres is not required. McDonald v. Montana Wood Co., 35 Pac. Rep. 668. *Contra*, Ferrell v. Hoge, 18 L. D. 81; Louise Mining Co., 22 L. D. 662; Wingate Placer, 22 L. D. 704.

31. Only twenty acres of placer ground may be embraced in a single location by an individual. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

32. A location of one hundred and sixty acres as a placer claim is an entirety, constituting but a single claim. Com'r to Aaron F. Parker, April 12, 1893; Com'r to John Cowell, June 5, 1893.

33. Every twenty-acre placer location is to be considered as a separate claim notwithstanding the fact that title to several contiguous locations has become vested in one person who makes application therefor, and an expenditure of $500 upon or for the benefit of every location must be shown. Circular (Departmental), Dec. 7, 1882, 9 C. L. O. 163.

34. The size of a placer claim, located prior to the act of July 9, 1870, is regulated by the local law. Subsequent to July 9, 1870, and prior to May 10, 1872, no placer location might exceed one hundred and sixty acres. From and after May 10, 1872, a location of a placer claim by an individual may not exceed twenty acres, and by an association one hundred and

sixty acres. Com'r to H. F. Page, Nov. 21, 1874, 1 C. L. O. 134.

35. An individual owner of a placer claim may not, by making relocation or amended or additional location, increase the area of his claim more than twenty acres, and if the additional area taken exceeds twenty acres, the additional location is void as to the excess. Joseph M. Knapp, 2 L. D. 768.

36. Placer claims may be located jointly by two or more persons. Chapman v. Toy Long, 4 Sawy. 28; 1 Mor. Min. Rep. 497.

37. The owner of a placer mining claim does not forfeit his right thereto, so as to render it subject to relocation, by a failure to perform the annual assessment work during a time when adverse possession is held by another, where he commences action for its recovery within the statutory time. Trevaskis v. Peard, 44 Pac. Rep. 246 (Cal.).

3. *Expenditure.*

(See EXPENDITURE, p. 234.)

38. Annual expenditures are not required to be made on placer claims. Com'r to R. B. Patton, April 25, 1874, 1 C. L. O. 18.

39. The law requiring $100 to be expended annually in labor or improvements, to hold a mining claim, applies to placer claims. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 678; Jackson v. Roby, 109 U. S. 440; Carney v. Arizona G. M. Co., 65 Cal. 40; 2 Pac. Rep. 734; J. P. Sears, 8 C. L. O. 152; Circular, March 24, 1887, 8 L. D. 505.

40. Where a consolidated placer claim embraces tracts held under different locations, in order to obtain a patent the claimant must show $500 to have been expended upon or for the benefit of every location. (The same rule applies as in case of several contiguous lode claims, and $500 upon the consolidated claim, if for the joint development of all the locations, would be sufficient.) Joseph M. Knapp, 2 L. D. 768; Com'r to Smith Brothers, Sept. 20, 1879, 7 C. L. O. 4.

41. Where a placer claimant bases his right to a patent upon possession of the claim during the period prescribed by the Statute of Limitations, he is not required to show an expenditure of $500 upon the claim. J. P. Sears, 8 C. L. O. 152.

42. The cost of a survey preliminary to the location of a ditch for the development of a placer claim will not be credited on the required statutory expenditure where it appears that said ditch has not been dug, although it might have been so considered had the ditch been afterwards dug. Stork & Heron Placer, 7 L. D. 359.

4. *Lode.*

(See VEINS, p. 19.)

43. A lode within a placer claim, known at the date of application for the placer patent, is carved out of the placer patent. Dahl v. Raunheim, 132 U. S. 260. See 6 Mont. 167; 9 Pac. Rep. 892.

44. A patent to a placer, under section 2333, United States Revised Statutes, passes no title to a previously located lode within its boundaries. Whether or not the placer applicant knew of its existence is immaterial. Mantle v. Noyes, 5 Mont. 274; 5 Pac. Rep. 856; S. C., 127 U. S. 348.

45. Section 2333, United States Revised Statutes, provides that lodes within a placer known at date of application for placer patent and not applied for by the placer applicant are excepted from the placer patent. Clary v. Hazlitt, 67 Cal. 286; 7 Pac. Rep. 701.

46. A lode known to exist at date of application for a placer patent, "however insignificant in value," is excepted from the placer application, together with twenty-five feet of surface ground on each side of the middle of the lode. Becker v. Sears, 1 L. D. 577.

47. A vein or lode known to exist at the date of placer application for patent and not included in said application must be excluded from the placer entry. The formal location of a lode claim is not necessary to exclude it from a placer patent, the only requisites being that it was known to exist, and was not included in the placer application. Railroad Lode v. Noyes Placer, 9 L. D. 26.

48. In an action by the patentee of a placer claim to recover possession of a vein or lode within its boundaries, an answer alleging that the vein or lode was known to the patentee to exist at the time of applying for the patent, and was not included in the placer application, well pleads the fact which, under section 2333, United States Revised Statutes, precludes the patentee from having any right of possession of the vein or lode. Sullivan v. Iron Silver M. Co., 109 U. S. 550.

49. The title to all veins or lodes within a placer claim, known to exist at the date of the placer application for patent and not included in such application, remains in the United States, and the placer patentee or his grantees have no right to dispossess any one in the peaceable possession of such vein or lode, whether the latter have any title or not. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

50. To be excepted from a placer patent a lode need not have been located at date of the application for such patent. "It is enough that it be known, and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises," etc. Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394; Sullivan v. Iron Silver M. Co., 143 U. S. 431; Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591; Iron Silver M. Co. v. Reynolds, 124 U. S. 374; Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

51. A vein or lode that has never been claimed, that has not been located, that has not been marked out by metes and bounds, and in which there has been no actual development, is not excepted from a placer application and patent. Iron Silver M. Co. v. Sullivan, 5 McCrary, 274; 16 Fed. Rep. 829. (Reversed in Sullivan v. Iron Silver M. Co., 143 U. S. 431.)

52. The formal location of a lode is not necessary to exclude it from a placer patent, the only requisite to such exclusion by operation of law being (1) that it was known to exist at date of application for the placer patent, and (2) that it was not included in such application. Railroad Lode v. Noyes Placer, 9 L. D. 26.

53. The legal location of a placer mining claim will not prevent the location of lode claims therein by other persons at any time previous to application for patent for the placer. Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 L. D. 95.

54. A lode, to be excepted from a placer entry, must have been known at date of the application for placer patent. War Dance Lode v. Church Placer, 1 L. D. 549.

55. The discovery, subsequent to application for a placer patent, of veins or lodes within the limits of the placer claim does not affect the rights of the placer applicant. United States v. Iron Silver M. Co., 128 U. S. 673.

56. A lode within the limits of a patented placer claim, to be excepted from the placer patent, must have been known to exist at date of the application for the placer patent. Mere belief, not based on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore, which might be merely parts of a single vein of continuous extension through all that territory, is not knowledge required by section 2333, United States Revised Statutes. Iron Silver M. Co. v. Reynolds, 124 U. S. 374. (S. C., 116 U. S. 687, first trial.) United States v. Iron Silver M. Co., 128 U. S. 673; Sullivan v. Iron Silver M. Co., 143 U. S. 431.

57. A known vein, to be excepted from a placer patent, must possess qualities not required to render a vein subject to location under section 2320, United States Revised Statutes: *i. e.*, it must be known, at date of the application for a placer patent, to be sufficiently valuable to be capable of being profitably worked. Montana Central Ry. Co. v. Migeon, 68 Fed. Rep. 811.

58. A lode, to be excepted from a placer patent, must have been known to be valuable enough to justify exploitation at date of application for the placer patent. Brownfield v. Bier, 15 Mont. 403; 29 Pac. Rep. 461.

59. To be excepted from a placer application for patent, a lode must have been known to be valuable for mineral at date of such application. Largey v. Black, 10 L. D. 156.

60. The existence of lodes, unknown at the date of application for a placer claim, but discovered prior to issuance of patent, does not operate to exclude any surface ground or the lode from the placer patent. War Dance Lode v. Church Placer, 1 L. D. 549.

61. The discovery of lodes within the limits of a placer claim, after application for a placer patent, constitutes no bar to the issuance of the placer patent. J. P. Sears, 8 C. L. O. 152.

62. A placer patent conveys title to a lode not then known to exist. Raunheim v. Dahl, 6 Mont. 167; 9 Pac. Rep. 892; 132 U. S. 260; Montana Copper Co. v. Dahl, 6 Mont. 131; 9 Pac. Rep. 894.

63. Where no vein or lode is known to exist within a placer claim at date of application for patent therefor, the patent for such placer claim shall carry all such veins or lodes within its boundaries which may be afterwards found to exist under its surface. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

64. A placer patent conveys to the patentee full title to all lodes or veins within the territorial limits not then known to exist; nothing disclosed after the issue of patent can limit the effect of the patent or except from its scope any vein or lode not so known. Sullivan v. Iron Silver M. Co., 143 U. S. 431.

65. A lode within a placer location belongs to the placer claimant if not known at date of application for placer patent. Montana Copper Co. v. Dahl, 6 Mont. 131; 9 Pac. Rep. 894.

66. A patent for a placer claim carries title to all veins or lodes in said claim not known at date of application for placer patent. Maggie Lode, 14 L. D. 655.

67. Where it appears to the satisfaction of the Land Department that a lode was known at date of placer application for patent, the lode may be patented notwithstanding the issuance of the placer patent, but the lode claimant will be restricted, as to surface ground, to twenty-five feet on each side of the middle of the vein. (Departmental decision.) Moyer v. Mike & Starr G. & S. M. Co., 10 C. L. O. 150. (Citing Becker v. Sears, 1 L. D. 577; War Dance Lode v. Church Placer, 1 L. D. 549; Robinson v. Roydor, 1 L. D. 564; Shonbar Lode, 1 L. D. 551.) To same effect, see Searl v. Finn, 10 C. L. O. 119. But see Pikes Peak Lode, 10 L. D. 200; South Star Lode, 20 L. D. 204.

68. Where an applicant for a lode patent shows the lode to have been known at date of application for a patented placer with which it conflicts, instead of incurring the expense of suit by the United States to vacate the placer patent as to the conflict, the Land Department may accept a reconveyance of the land to the United States, which would reinvest the Department with jurisdiction over it. Juniata Lode, 13 L. D. 715.

69. On a sufficient showing by the applicant for a lode claim situate in a patented placer, a hearing may be ordered to determine whether the lode was known at the date of the placer application, with the view of recommending suit by the United States Attorney-General to vacate the placer patent as to the conflict. Rebel Lode, 12 L. D. 683; Pikes Peak Lode, 14 L. D. 47. (Modified by South Star Lode, 20 L. D. 204.)

70. An application for a lode claim in conflict with a patented placer may not be received by the Land Department as long as the placer patent remains outstanding. If the placer patent was issued upon false proof, suit to vacate the same should be brought by the United States. Pikes Peak Lode, 10 L. D. 200. (Overruled by South Star Lode Case, 20 L. D. 204.)

71. Where the record shows that there is no known vein or lode within the boundary of a placer claim, and patent regularly issues thereon, no subsequent application for a lode claim within said placer should be accepted so long as said placer patent remains uncanceled. Rebel Lode, 12 L. D. 683. See South Star Lode, 20 L. D. 204.

72. The validity of a placer patent and its extent, as in conflict with an alleged known lode or vein, are questions that can only be determined by judicial authority. Pikes Peak Lode, 10 L. D. 200. See South Star Lode, 20 L. D. 204.

73. The question of whether or not a lode was known to exist within a placer claim at date of the application for placer patent is always one for an ultimate decision by the courts. After the Land Department has issued a patent for the placer claim its jurisdiction over the land patented has ceased, and the only way the title of the patentee can be impeached is by proper proceedings in court. Iron Silver M. Co. v. Campbell, 135 U. S. 286.

74. The owner of a lode alleged to have been known at date of application for patent to a placer (since patented), covering a lode, should apply for patent in the usual manner and allow the placer patentee to adverse should he desire. Olathe Placer, 4 L. D. 494. See South Star Lode, 20 L. D. 204.

75. An applicant for a patent for a lode claim within a patented placer claim must show the existence of such mine and its true

location and prove his possessory right and the value of work performed. Moyer v. Mike & Starr G. & S. M. Co., 10 C. L. O. 150.

76. Where a patented placer is found to be in conflict with a lode claim, and the facts are such as to warrant judicial proceedings for the vacation of the patent as to the land in conflict, the patentee may, by mesne conveyance, surrender the title of such land to the government, and so vest the Department with jurisdiction to again dispose of the land. Juniata Lode, 13 L. D. 715.

77. Where it is ascertained by inquiry instituted by the Department, or determined by a court of competent jurisdiction, that a lode claim exists within the boundaries of land covered by a placer patent, and that such lode claim was known to exist at the date of application for such patent and was not applied for, it must be held that the land embraced in such lode is reserved from the operation of the conveyance by the general terms of exception therein, and that patent may issue for the lode claim if the law has been in other respects complied with. (Case of Pikes Peak Lode, 14 L. D. 47, overruled.) South Star Lode (review), 20 L. D. 204.

78. In assuming to issue patent for a lode claim alleged to have been known at the date of application for a placer patent (since issued) covering the land, the Department will proceed with caution, and will require the known existence of such lode at that date to be clearly shown. Departmental decision of May 13, 1896, *In re* Lucy L. Lode.

79. Where an entry is made of a lode claim in conflict with a patented placer claim, and it appears that the title under the placer patent, to the ground in conflict, is vested in the lode claimant, the known existence of the lode at date of the application for the placer patent may be shown by *ex parte* affidavits, as there could be no opposing party to render a hearing necessary. But after the issuance of a placer patent the Land Department will not assume that a lode was known to exist within the placer claim because of the fact that a lode claim was located therein prior to the placer application. The known existence of the lode at that date must be shown as a fact by proof. Valley Lode, 22 L. D. 713.

80. Section 2333, United States Revised Statutes, has no application to a legally located vein or lode within the boundaries of a placer claim. Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

81. Section 2333, United States Revised Statutes, applies only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned and are known to exist, the applicant for a patent for a placer claim must include them in his application or he will be deemed to have declared that he had no right to them. Sullivan v. Iron Silver M. Co., 143 U. S. 431. See S. C., 109 U. S. 550.

82. A placer applicant will not be allowed to amend his application for patent so as to embrace therein a lode discovered before the filing of such application, as the failure to embrace the same in the placer application in the first instance was under the law a conclusive waiver of all claims to the lode. Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 L. D. 95.

83. The limitation of the width of a lode claim within a placer prescribed by section 2333, United States Revised Statutes, has no application to a case where a lode was covered by a valid location of the full legal extent, prior to the application for placer patent, but the whole lode claim is excepted from the placer patent. Pikes Peak Lode, 10 L. D. 200.

84. The owner of a lode claim covered by an application for a placer patent is not obliged to adverse the placer application, for his claim is excepted from the operation of the placer patent by law. Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

85. Where an application for patent under the lode mining laws is made for land already patented to another under the placer mining laws, the provision of section 2326, United States Revised Statutes, does not require the placer patentee to adverse the application of the lode claimant, as only those holding mining claims by *possessory* title are required to proceed under that law. Iron Silver M. Co. v. Campbell, 135 U. S. 286. See 17 Colo. 267; 29 Pac. Rep. 513.

86. A placer patentee cannot be called upon to defend his title against a lode claimant before the Land Department. Iron Silver M. Co. v. Campbell, 135 U. S. 286. See 17 Colo. 267; 29 Pac. Rep. 513.

87. A placer claimant may file an adverse claim against the application for patent to a

lode claim conflicting with the placer claim. Bennett v. Harkrader, 158 U. S. 441.

88. Where a placer patentee has filed an adverse claim against the application for patent for a lode claim within the placer, and has begun suit thereon, the Land Department will take no action, but will leave the parties to secure a determination of their rights in court. Iron Silver M. Co. v. Mike & Starr M. Co., 6 L. D. 583.

89. A judicial award of the right of possession to an adverse placer claimant as against the applicant for patent for a lode claim does not preclude inquiry by the Land Department on an allegation of the lode claimant that the placer claim, as subsequently applied for, embraces a known lode, where it appears that the question was not tried on the adverse suit; and if such allegation is sustained, the lode claimant may make entry of his lode, together with surface ground necessary to the convenient working thereof. Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 L. D. 95.

90. During the pendency of a suit based upon an adverse claim filed by a placer claimant against an application for patent to a lode claim, entry may not be allowed upon said application. Clipper M. Co., 22 L. D. 527.

91. The Colorado courts entertain adverse suits brought by lode claimants against placer applicants. Alice Placer, 4 L. D. 314; Swaim v. Cravan, 12 L. D. 294.

92. In Montana suits are entertained based on adverse claims filed by lode claimants against an application for a placer patent. Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287; Railroad Lode v. Noyes Placer, 9 L. D. 26.

93. The locator of a lode claim who fails to adverse an application for a placer claim covering the same, by such failure loses his rights to surface ground in excess of twenty-five feet on each side of the middle of his lode. Shonbar Lode, 3 L. D. 388. (Modified in South Star Lode, 20 L. D. 204.)

94. A lode claimant who fails to adverse an application for patent to a conflicting placer claim is estopped from questioning the validity of the placer title. Raunheim v. Dahl, 6 Mont. 167; 9 Pac. Rep. 892. See 132 U. S. 260.

95. A judgment rendered on an adverse suit, awarding the surface of the ground involved to a placer claimant and lodes therein contained to lode claimants, is without authority of law, and will not be followed by the Land Department, which will not issue a patent for a placer claim containing known lodes belonging to one other than the placer claimant. Apple Blossom Placer v. Cora Lee Lode, 14 L. D. 641.

96. A dispute between mining claimants, one claiming the land as a lode claim and the other as a placer claim, must be settled in court, as the determination of such controversies is not within the jurisdiction of the Land Department. Com'r to C. Dodson, April 10, 1891.

97. Where application for a placer patent was made and no adverse filed by a lode claimant, and subsequently the lode claimant applied for patent and was adversed by the placer applicant, who began suit and then dismissed it, it was held that the placer applicant had abandoned the conflict, and that patent for the lode claim need not be confined to twenty-five feet on each side of the middle of the lode. Monroe Lode, 4 L. D. 273.

98. Proof of the location of a lode claim in a placer, at date of placer application for patent, is not proof of the known existence of the lode. Butte & Boston M. Co. v. Sloan, 16 Mont. 97; 40 Pac. Rep. 217.

99. One who locates a lode within a placer claim after publication of notice of placer application acquires no right to it, and (*semble*) nor does he acquire any right if the location is made after placer application. Montana Copper Co. v. Dahl, 6 Mont. 131; 9 Pac. Rep. 894.

100. Locations of lodes or veins within placer claims prior to application for placer patent, when perfected under the law, are the property of the locators or their assigns, and are not, therefore, subject to disposal by the government. Sullivan v. Iron Silver M. Co., 143 U. S. 431. (Citing and quoting Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510.)

101. "Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the

fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode." Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611.

102. After issuance of placer patent the owner of a lode therein, located with surface ground twenty-five feet on each side, may not so amend his location as to take in a greater amount of surface ground. Becker v. Sears, 1 L. D. 577.

103. The discovery of a quartz lode two hundred or three hundred feet outside of the boundaries of a placer claim raises no presumption that such lode extends within the placer boundaries, where there is no surface indication thereof. Raunheim v. Dahl, 6 Mont. 167; 9 Pac. Rep. 892. See 132 U. S. 260.

104. In the case of a known lode in a placer claim at date of the placer application for patent, and not included in the placer application, the rule which applies to all actions to recover possession of real estate applies, namely, that the plaintiff can only recover on the strength of his own title and not on the weakness of defendant's title. In such a case the placer claimant, being without title, may not dispossess a person in the peaceable possession of the lode. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

105. The fact that a placer patent was obtained with the intention of acquiring title to lodes supposed to exist within the placer claim but as yet undiscovered will not defeat the title of the placer patentee. Iron Silver M. Co. v. Reynolds, 124 U. S. 374; 116 U. S. 687 (first trial); 15 Mor. Min. Rep. 591.

106. The entry as a placer claim of land known to be valuable only for lodes contained is illegal, and will be canceled. Grosfield v. Nigger Hill Cons. M. Co., 14 L. D. 685.

107. A patent for a lode claim which is situated within the boundaries of a placer claim covered by a prior patent is not conclusive of the fact that the lode so patented was known to exist at the date of the application for the placer patent, and hence excepted from the placer patent. Iron Silver M. Co. v. Campbell, 135 U. S. 286. See 17 Colo. 267; 29 Pac. Rep. 518.

108. A placer and a lode claim not contiguous to each other cannot be embraced in the same patent. Com'r to Henry O'Conner, 5 C. L. O. 162.

109. In procuring a patent for a placer claim, under section 2333, United States Revised Statutes, where the claimant is also in possession of a lode or vein included within the boundaries of his placer claim, the patent shall cover both, if he makes this known and pays $5 per acre for twenty-five feet on each side of his vein, and $2.50 per acre for the remainder of his placer claim. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

110. Where application is made for patent to a placer claim, exclusive of lodes claimed by other parties, the lode claims must be surveyed by the placer applicant in order that the land covered thereby may be excluded from the placer patent. Com'r to F. C. Morse, 5 C. L. O. 5.

111. For the purpose of including ground claimed under a lode location, valid when made, and any veins or lodes the tops or apexes of which may be situated therein, the end line of the lode claim may be established within a patented placer claim, under the same principle as is laid down in paragraphs 50 and 51 of the Mining Circular, page 138, for conflicting lode claims. Black Diamond Lode, 22 L. D. 284.

112. An applicant for a placer patent, who has given due notice thereof and made an entry, may maintain a suit to quiet title against one claiming under a conflicting lode location. Dahl v. Raunheim, 132 U. S. 260.

5. *General.*

113. "It cannot be claimed that a location of a narrow strip of land 12,000 feet long, extending through three sections, conforms as near as practicable to the rectangular subdivisions of the public surveys, unless the adjoining land had been previously appropriated or reserved." Com'r to Sacramento Office, Jan. 16, 1883, *In re* William Rablin, 10 C. L. O. 8. (Reversed, S. C., 2 L. D. 764.)

114. *Held:* That a placer claim two miles long, containing only forty-one acres, along a ravine, surrounded by land not valuable for mineral, conforms as near as *reasonably* practicable to legal subdivisions. Departmental

decision, *In re* Esperance M. Co., 10 C. L. O. 338; William Rablin, 2 L. D. 764.

115. Though placer claims on surveyed lands are required to conform "as near as practicable" with legal subdivisions, they may be located along a stream or canyon, as it is not the intent of the law to compel the placer claimant to take land unfit for mining. William Rablin, 2 L. D. 764.

116. A placer claim on surveyed land must be located by legal subdivisions or the reason shown for failure to do so. Southern Pacific R. R. Co. v. Griffin, 20 L. D. 485.

117. A placer entry of a long, narrow strip of land covering a stream of water, on surveyed land, held to conform as near as *reasonably* practicable with the public surveys, where it is shown that the surrounding land was valueless for mining. (In this case four entries covered a strip of land from five to five hundred feet wide and about eighteen miles long.) Pearsall & Freeman, 6 L. D. 237.

118. Placer claims, located subsequent to May 10, 1872, must conform as near as practicable to the public surveys. Com'r to George A. Black, Jan. 6, 1879, 5 C. L. O. 162.

119. A placer claim may be located by legal subdivisional description, notwithstanding the suspension of the township survey. Gird v. California Oil Co., 60 Fed. Rep. 531.

120. As the evidence shows that the oil placer mining claim was located in good faith, it is no defense to a trespass to say that mineral does not exist upon the mining claim. Van Horn v. State of Wyoming, 40 Pac. Rep. 964.

121. "It has been the policy of the government to withhold patents for water rights, and leave them to be determined and protected by the local courts. It was clearly not the intention of Congress to allow a large river for two or three miles, with only a few feet of ground along its banks, to be patented as a placer claim." Com'r to Sacramento Office, Jan. 16, 1883, *In re* William Rablin, 10 C. L. O. 8. Reversed by Secretary's decision in Same Case, 2 L. D. 764, wherein it is stated that "It is well settled that if the beds of unnavigable streams contain mineral deposits they may be appropriated for mining purposes, and that, as to the water, the locator obtains only an usufruct in it."

122. An application for a patent to a placer claim will be rejected where it is evident that it is sought to acquire title, not to a placer mine, but to a water right. William A. Chessman, 2 L. D. 774; Robert S. Hale, 3 L. D. 536.

123. If the land contains gold or other valuable deposits in loose earth, sand or gravel, which can be secured at a profit, it is enterable under the placer mining laws, regardless of other valuable qualities it may possess, such as timber, or the uses besides mining to which it may be put. But if a patent is secured under the placer mining laws for land not containing any placer deposits, for the purpose of securing title to the timber thereon, the United States may maintain a suit to vacate such patent for fraud in its procurement. United States v. Iron Silver M. Co., 128 U. S. 673. See 5 McCrary, 266; 24 Fed. Rep. 568.

124. A placer entry and patent may embrace more than one hundred and sixty acres. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Good Return M. Co., 4 L. D. 221.

125. A person or association may purchase as many placer claims as the local laws permit and embrace them all in one application for patent. Com'r to H. F. Page, Nov. 21, 1874, 1 C. L. O. 134.

126. If properly located, an unlimited area may be embraced in an application for patent to a placer claim. Com'r to Smith Brothers, Sept. 20, 1879, 7 C. L. O. 4.

127. A patent for a placer claim carries with it title to the surface as well as the land beneath the surface. Deffeback v. Hawke, 115 U. S. 392.

128. The statutes of Montana requiring a record to be made of vein mining claims cannot be construed to include placer claims. The record is therefore no part of the chain of title to a placer claim, and hence is inadmissible in evidence. Moxon v. Wilkinson, 2 Mont. 421; 12 Mor. Min. Rep. 602.

129. Circular of September 22, 1882, as to reports by Deputy Surveyors on placer claims. 1 L. D. 685.

130. An examination of a placer claim, and report thereon by the United States Deputy Mineral Surveyor under the Circular of September 22, 1882, at the expense of the applicant for patent, is not required where the claim is taken by legal subdivisions. Rosina T. Gerhauser, 7 L. D. 390.

131. The report of the United States Deputy Mineral Surveyor who examines a placer mining claim in his official capacity, which shows the land to be mineral in character, overcomes the slight presumption raised by its return by the Surveyor General as agricultural in character, and places the burden of proof upon one alleging its non-mineral character. State of Washington v. McBride, 18 L. D. 199.

132. Patent will not issue for a placer claim comprising non-contiguous tracts. Com'r to Coeur d'Alene Office, March 7, 1894, *In re* Noonday Placer.

133. A lode claim intersected by an excluded placer must be restricted upon entry to that one of its non-contiguous parts on which is situated the discovery. Silver Queen Lode, 16 L. D. 186.

134. Entry should not be allowed for a lode claim made non-contiguous by the exclusion of a placer claim. Apple Blossom Placer v. Cora Lee Lode, 21 L. D. 438.

135. Placer lands between high and low tides cannot be sold by the United States, as they belong to the State. William E. Morris, 9 C. L. O. 5.

136. A placer claim consisting of five-acre portions of legal subdivisions is not taken by legal subdivisions and must be surveyed. Com'r to Sacramento Office, Oct. 23, 1873, Copp's Min. Lands, 123.

137. A mineral entry of several contiguous five-acre portions of legal subdivisions is passed to patent. Fire Clay Placer, Pueblo, Colo., Mineral Entry No. 231.

138. A half of a lot (made fractional by mining claims) is not a legal subdivision, and a placer claim embracing the same must be regularly surveyed. G. A. Khern, 6 L. D. 180.

139. An entry of a placer claim may be patented where the land entered is described as certain portions of lots (as the N. E. ¼ of lot 1, of a certain section), as the excess or deficiency of area will be taken to fall upon the north and west sides of the fractional lot. Com'r to Redding Office, July 18, 1896, *In re* Ten Per Cent. Placer. *Contra*, Com'r to Leadville Office, Aug. 21, 1896, *In re* Monitor No. 1 Placer.

140. An entry of a placer claim in excess of the area allowed by law (less than five acres excess) has been passed to patent. See Sacramento, Cal., Mineral Entry No. 1345, Spring Placer.

141. Miners' regulations limiting the length of placer claims to eighty rods are not unreasonable and are binding. Lansdale v. Ives, 2 Idaho, 244; Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324.

142. One who locates a stone placer has title to all other minerals found in the claim. Freezer v. Sweeney, 8 Mont. 508; 21 Pac. Rep. 20.

143. Lands embraced in placer claims are not subject to entry as town sites. Town Site of Deadwood, 8 C. L. O. 153. (But see Act of March 8, 1891, in TOWN SITE.)

STATUTE OF LIMITATIONS.

I. THE STATUTE.
II. REGULATIONS.
III. DECISIONS.

I. THE STATUTE.

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining-claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining-claim or property thereto attached prior to the issuance of a patent. 16 Stat. 217; sec. 2332, U. S. Rev. Stat.

II. REGULATIONS.

33. In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, etc.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

69. With regard to the proofs necessary to establish the possessory right to a mining claim, section 2332 provides that "where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the

statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

70. This provision of law will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

71. When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the State or Territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides which he may desire to submit in support of his claim.

72. There should likewise be filed a certificate under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining-claims in the State or Territory aforesaid, other than that which has been finally decided in favor of the claimant.

73. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

III. Decisions.

1. The Statute of Limitations does not run against the United States. Hence, it cannot run against a claimant or occupant of public land until after the issuance of patent. Redfield v. Parks, 132 U. S. 239; Richardson v. Williamson, 24 Cal. 289; Reed v. Spicer, 27 Cal. 57; 4 Mor. Min. Rep. 330; Irvine v. Tarbat, 105 Cal. 237; Vansickle v. Haines, 7 Nev. 249; 15 Mor. Min. Rep. 201. See, also, Jones v. Adams, 19 Nev. 78.

2. The Statute of Limitations does not commence to run against parties claiming under a patent confirming a Mexican grant until the date of the issuance of patent, if the adverse claimant does not show the existence of a perfect grant prior to the issuance of patent. Tuffree v. Polhemus, 108 Cal. 670.

3. Rights against the United States are not acquired under the Statute of Limitations. Drew v. Valentine, 18 Fed. Rep. 712.

4. The United States cannot be affected by a State Statute of Limitations; nor is it amenable to the doctrine of laches. Redfield v. Parks, 132 U. S. 239.

5. Until patent issues the legal title to land entered is in the United States. Therefore, a town lot owner claiming adversely to a mining claimant cannot set up the Statute of Limitations as having begun to run before the issuance of patent on the mining claim. King v. Thomas, 12 Pac. Rep. 865; Mayer v. Carrothers, 86 Pac. Rep. 182.

6. The exemption of the government from the operation of the Statute of Limitations or from the application of the doctrine of stale claim will not allow the statute or said doctrine to be evaded by the bringing of suit in the name of the United States, when a private person is the real party in interest. United States v. Beebe, 127 U. S. 338.

7. The Statute of Limitations may not be evaded by private persons by bringing suit to vacate a patent in the name of the United States. Curtner v. United States, 149 U. S. 662.

8. The Statutes of Limitation of Nevada except foreign corporations from their protection. Union Cons. S. M. Co. v. Taylor, 100 U. S. 37; 5 Mor. Min. Rep. 323; Robinson v. Imperial S. M. Co., 5 Nev. 44; Barstow v. Silver M. Co., 10 Nev. 386.

9. The taking of hostile possession of a mining claim by one tenant in common and excluding the co-tenant is an ouster from the date of which the Statute of Limitations begins to run in favor of the tenant so taking possession and against his co-tenant. 420 Mining Co. v. Bullion M. Co., 3 Sawy. 634; 9 Nev. 240; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

10. Where "the complaint alleges that a valid and legal location of a tunnel (claim) was made by persons under whom the plaintiff claims, and the plaintiff held possession of the same for more than five consecutive years prior to the ouster by defendants, and paid all the taxes during that period legally or otherwise assessed upon said property," the plaintiff under the Colorado laws would have the right to the premises in dispute, superior to any other claim, except that of the government. Glacier Mountain S. M. Co. v. Willis, 127 U. S. 471.

11. A valid location will be presumed where a party has had possession under color of title for the period prescribed by the Statute of Limitations, and an adverse location made during such possession will be defeated. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178.

12. Title to land under the Statute of Limitations must be based upon possession for the prescribed period after the issuance of patent. McTarnahan v. Pike, 91 Cal. 540.

13. No rights can be acquired by adverse possession under the Statute of Limitations by sinking on the dip of a vein, without the knowledge of the owner of the apex. Pardee v. Murray, 4 Mont. 234; 2 Pac. Rep. 16; 15 Mor. Min. Rep. 515.

14. The Statute of Limitations may give the possessor of a mining claim good title as against other claimants. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178.

15. The Statute of Limitations of Nevada constitute a part of the local laws, by which the rights between an applicant for patent and an adverse claimant are to be determined. 420 Mining Co. v. Bullion M. Co., 3 Sawy. 634; 9 Nev. 240; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

16. Plaintiff on adverse suit cannot recover if defendant proves possession of the claim during the period prescribed by the State Statute of Limitations. 420 Mining Co. v. Bullion M. Co., 3 Sawy. 634; 9 Nev. 240; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

17. Adverse possession for the time limited by the Statute of Limitations vests a perfect title in the adverse holder, which title may be quieted in his favor by a bill in equity. 420 Mining Co. v. Bullion M. Co., 9 Nev. 240; 3 Sawy. 634; 1 Mor. Min. Rep. 114; 11 Mor. Min. Rep. 608.

18. An adverse claim may not be asserted under the Statute of Limitations after mineral entry has been made. Rader v. Allen, 27 Oreg. 344; 41 Pac. Rep. 154.

19. A ditch owner whose ditch runs over the claim of another may acquire a right to maintain his ditch under the Statute of Limitations. McLaughlin v. Del Re, 17 Pac. Rep. 515.

20. Where water from defendant's ditch discharged into a stream just above the head of plaintiff's ditch, the fact that plaintiff used the water so escaping from defendant's ditch for a period of fourteen years without interference by defendant does not create a right to use the same by prescription, for the use under such circumstances did not constitute any invasion of the rights of defendant, it being neither exclusive, adverse, hostile, nor under a claim of right. Wimer v. Simmons, 27 Oreg. 1; 39 Pac. Rep. 6.

21. The United States, asserting rights vested in it as a sovereign, is not bound by any Statute of Limitations, unless Congress has clearly manifested its intention that it should be so bound. This doctrine is equally applicable to suits at law and in equity. United States v. Nashville, etc. Ry. Co., 118 U. S. 120; United States v. Insley, 130 U. S. 263.

22. A water right may be lost by the adverse possession of another; but in such cases non-user by the owner, and adverse possession by another, for a period equal to that fixed by the Statute of Limitations relating to real property, are necessary to divest title. Wimer v. Simmons, 27 Oreg. 1; 39 Pac. Rep. 6.

UNITED STATES DEPUTY MINERAL SURVEYORS.

I. The Statute.
II. Regulations.
III. Decisions.

I. The Statute.

The surveyor-general of the United States may appoint in each land-district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining-claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together

with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land-district where mines are situated for the publication of mining-notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land-office, which statement shall be transmitted, with the other papers in the case, to the Commissioner of the General Land Office. 17 Stat. 95; 19 Stat. 52; sec. 2334, U. S. Rev. Stat.

II. Regulations.

98. The surveyors-general of the several districts will, in pursuance of said law, appoint in each land district as many *competent* deputies for the survey of mining claims as may seek such appointment; it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States; the system of making *deposits* for mineral surveys, as required by previous instructions, being hereby revoked as regards *field work;* the claimant having the option of employing *any* deputy surveyor within such district to do his work in the field.

99. With regard to the *platting* of the claim and other *office work* in the surveyor-general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer or designated depository in favor of the United States Treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor-general duplicate certificates of such deposit in the usual manner.

100. The surveyors-general will endeavor to appoint mineral deputy surveyors, so that one or more may be located in each mining district for the greater convenience of miners.

101. The usual oaths will be required of these deputies and their assistants as to the correctness of each survey executed by them.

The duty of the deputy mineral surveyor ceases when he has executed the survey and returned the field notes and preliminary plat thereof with his report to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim.

The surveyors-general and local land officers are expected to report any infringement of this regulation to this office.

102. The law requires that each applicant shall file with the register and receiver a sworn statement of all charges and fees paid by him for publication of notice and for survey, together with all fees and money paid the register and receiver, which sworn statement is required to be transmitted to this office for the information of the Commissioner.

103. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

III. Decisions.

(See Survey, p. 148, and Land Department, p. 435.)

AFFIDAVITS.

I. The Statutes.
II. Decisions.

I. The Statutes.

All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land-district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land-office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land-office as published nearest to the location of such land; and the register shall require proof that such notice has been given. 17 Stat. 95; 19 Stat. 52; sec. 2335, U. S. Rev. Stat.

Act of April 26, 1882.

An Act to amend section twenty-three hundred and twenty-six of the Revised Statutes, in regard to mineral lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney-in-fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the

time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

SEC. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any State or Territory. 23 Stat. 49.

II. DECISIONS.

(See ADVERSE, p. 285, and CITIZENSHIP, p. 48.)

CHARACTER OF LAND.

(See also HEARING, p. 421.)

I. THE STATUTE.
II. REGULATIONS.
III. DECISIONS.
1. *Land Department.*
2. *Return.*
3. *Burden of Proof.*
4. *Proof.*
5. *Mineral.*
6. *Non-mineral.*
7. *Discovery.*
8. *Location.*
9. *Entry.*
10. *Agricultural.*
11. *Grants.*
12. *Patent.*
13. *Segregation.*
14. *Town Site.*
15. *Mill Site.*
16. *General.*

I. THE STATUTE.

(See sec. 2335, U. S. Rev. Stat., p. 336.)

II. REGULATIONS.

108. The "Rules of Practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior," approved August 13, 1885, will, as far as applicable, govern in all cases and proceedings arising in contests, and hearings to determine the mineral or nonmineral character of lands.

109. No public land shall be withheld from entry as agricultural land on account of its mineral character, except such as is returned by the surveyor-general as mineral; and the presumption arising from such a return may be overcome by testimony taken in the manner hereinafter described.

110. Hearings to determine the character of lands are practically of two kinds, as follows:

1. When lands are returned as mineral by the surveyor-general.

When such lands are sought to be entered as agricultural under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper nonmineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is *not* required, notice thereof must first be given by publication for thirty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

2. When lands which are sought to be entered as agricultural are alleged by affidavit to be mineral or when sought as mineral their non-mineral character is alleged. The proceedings in this class of cases are in the nature of a contest between two or more known parties and are provided for in the rules of practice.

111. At the hearings under either of the aforesaid classes, the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof — whether of the shallow-surface description, or of the deep cement, blue lead or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all.

112. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised; also which of these

subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

118. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all, valuable deposits of mineral were first known to exist on the lands.

114. When the case comes before this office, such decision will be made as the law and the facts may justify; and in cases where a survey is necessary to set apart the mineral from the agricultural land, the necessary instructions will be given to enable the proper party *at his own expense*, to have the work done, at his option, either by United States deputy, county, or other local surveyor; the survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section 2320, U. S. Revised Statutes, as to length and width and parallel end lines.

115. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

116. Upon the filing of the plat and field notes of such survey, duly sworn to as aforesaid, you will transmit the same to the surveyor-general for his verification and approval; who, if he finds the work correctly performed, will properly mark out the same upon the original township plat in his office, and furnish authenticated copies of such plat and description both to the proper local land office and to this office, to be affixed to the duplicate and triplicate township plats respectively.

117. With the copy of plat and description furnished the local office and this office, must be a diagram tracing, verified by the surveyor-general, showing the claim or claims segregated, and designating the separate fractional agricultural tracts in each 40-acre legal subdivision by the proper lot number, beginning with No. 1 in each section, and giving the area in each lot, the same as provided in paragraph 45, in the survey of mining claims on surveyed lands.

118. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. A miner is compelled by law to give sixty days' publication of notice, and posting of diagrams and notices, as a preliminary step; and then, before he can enter the land, he must show that the land yields mineral; that he is entitled to the possessory right thereto in virtue of compliance with local customs or rules of miners, or by virtue of the statute of limitations; that he or his grantors have expended, in actual labor and improvements, an amount of not less than five hundred dollars thereon, and that the claim is one in regard to which there is no controversy or opposing claim. After all these proofs are met, he is entitled to have a survey made at his own cost where a survey is required, after which he can enter and pay for the land embraced by his claim.

III. Decisions.

1. *Land Department.*

(See Land Department, p. 423.)

1. Paragraphs 109, 110, Mining Circular, amended. 19 L. D. 5.

2. The Land Department in issuing a patent must necessarily consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings against the patent. Steel v. St. Louis Sm. Co., 106 U. S. 447.

3. The Secretary of the Interior is authorized to designate certain lands as agricultural under the law of July 26, 1866. State of Nevada v. Mineral Return, 1 C. L. O. 18-114; Central Pacific R. R. Co. v. Mineral Return, 1 C. L. O. 114.

4. A hearing to determine the character of the land covered by a mineral application, and the question of compliance with the law by the applicant, may be ordered by the local land office on protest filed. Devereux v. Hunter, 11 L. D. 214.

5. When there is any doubt as to whether or not a tract is more valuable for mineral than for agricultural purposes, a final award will not be made to the agricultural claimant; but a hearing will be ordered to determine the true character of the land. Magalia G. M. Co. v. Ferguson, 8 L. D. 234.

6. A hearing may be ordered to determine the correctness of the United States Surveyor General's return as to the character of certain land. Wallace v. State of California, 5 C. L. O. 22.

7. The question of the character of land should not be decided upon *ex parte* proof. Rivers v. Burbank, 9 C. L. O. 238.

8. A hearing may be ordered under the mining laws to ascertain facts necessary to a

correct disposal of public lands. Wood v. Seymour, 4 C. L. O. 178.

9. Where land applied for under the agricultural land laws is alleged to be mineral in character, the agricultural application may be suspended to await development of mineral. Ewing v. Hartman, 1 C. L. O. 180.

10. *Ex parte* affidavits with no opportunity for cross-examination should not be entertained in mining contests. France v. Harrison, 5 C. L. O. 66.

11. A hearing to prove the agricultural character of saline land is not allowed when its saline character is not denied, as it is not subject to agricultural entry if saline in character. Maria Deford, 2 C. L. O. 131.

12. Hearings to determine the character of lands returned as saline are provided for by the act of January 12, 1877 (19 Stat. 221). Circular of April 10, 1877, 4 C. L. O. 21.

13. Where a special agent reports land covered by a placer entry not to be placer ground, a hearing should be ordered to determine its true character. A. D. Searl Placer, 9 C. L. O. 180.

14. The character of land is a question of fact to be determined by investigation. (Salines.) Henry C. Horton, 9 C. L. O. 121.

15. Where land is returned as mineral in character, final entry therefor under laws not requiring publication of notice should not be allowed until notice has been given by publication and posting in the land office. Circular of Sept. 23, 1880, 9 C. L. O. 147; Ewing v. Hartman, 1 C. L. O. 180; Paragraphs 109 *et seq.*, Mining Regulations.

16. In a hearing to determine the character of the land, any person who has knowledge thereof is permitted to testify, regardless of any interest he may have in the matter. William B. Knott, 2 C. L. O. 146.

17. In case of a hearing ordered under the General Mining Circular, the Rules of Practice with respect to appeal must be followed to prevent the decision of the local office as to the character of the land from becoming final. Stein v. Fisher, 5 L. D. 671.

18. The mineral contestants failing to show affirmatively the mineral value of land covered by a final homestead entry, it is awarded to the agricultural claimant. Small v. Howell, 9 C. L. O. 164.

19. Hearings to determine the character of land. Circular of July 2, 1894, amending paragraphs 109 and 110 relative thereto, 19 L. D. 5.

20. Though the mineral character of a tract is admitted by the railroad company in a judicial proceeding instituted for the possession thereof by the company, yet the Department, in the administration of the law, is required to determine the actual character of the land in question. Where land in the vicinity of valuable mineral deposits is returned as mineral in character on the township plat, clear and positive proof of its non-mineral character can alone overcome the return of the United States Surveyor General. Secretary, April 17, 1880.

21. A judgment on an adverse suit is not conclusive upon the United States as to the character of the land involved or as to the parties' compliance with law. Apple Blossom Placer v. Cora Lee Lode, 14 L. D. 641.

22. The judgment of a court to the effect that lands are mineral does not bind the Land Department, whose duty it is to determine for itself the character of the land to be disposed of. Barden v. N. P. R. R. Co., 19 L. D. 188.

23. The judgment of a State court in a proceeding under a State law, to the effect that land is non-mineral in character, does not bind the Land Department. Overman Silver M. Co. v. Maxwell, 10 C. L. O. 191.

24. The judgment of a State court on an adverse suit between a lode claimant and a placer claimant, each claiming a deposit of limestone, to the effect that neither party is entitled to the land because limestone is not a mineral, is not binding on the Department, and it will follow the judgment of the lower court even though it has been reversed. Com'r to Seattle Office, Aug. 28, 1893, *In re* Orcas Island Lime Mine; S. C. as Wheeler v. Smith, 5 Wash. St. 784; 32 Pac. Rep. 784.

25. It is within the discretion of the Commissioner of the General Land Office to order a hearing to ascertain the character of the land, and whether the conditions of the law have been complied with, though the applicant for patent may have obtained a favorable judgment in the courts as against the adverse claimant. Alice Placer, 4 L. D. 314.

26. A decision by the Land Department as to the character of land is not conclusive as

to the character as known subsequent to the trial of the case upon which the decision is rendered. Thomas v. Thomasson, 16 L. D. 52.

27. A final decision of the Land Department holding a tract to be non-mineral in character is conclusive up to the date of the hearing, but does not preclude further inquiry based on subsequent development of mineral. Stinchfield v. Pierce, 19 L. D. 12.

28. A decision as to the character of land is conclusive only up to the date of the inquiry on which the decision is based. Zadig v. Central Pacific R. R. Co., 20 L. D. 26; Dargin v. Koch, 20 L. D. 384; McCharles v. Roberts, 20 L. D. 564; Barnstetter v. Central Pacific R. R. Co., 21 L. D. 464.

29. The failure of one mineral contest against an agricultural entry embracing land returned as mineral, and the presentation of satisfactory final proof by the agricultural occupant, will not prevent parties who were not interested in such contest, and who claim to have discovered valuable mineral on the land subsequent to such proceedings, from instituting another contest prior to issuance of patent. Werle v. Murphy, 15 C. L. O. 183.

30. The character of the land can be inquired into at any time prior to the issuance of patent. A prior decision by the Land Department that the land in dispute is mineral land will not prevent another hearing and an opposite decision. Searle Placer, 11 L. D. 441.

31. Where land has been adjudged mineral, an agricultural claimant who shows that mining operations thereon have been abandoned as unprofitable, in the absence of any other showing of the mineral character, is entitled to a decision holding it to be non-mineral. Thomas v. Thomasson, 16 L. D. 52.

32. The burden of proof is upon one attacking a judgment of the Department as to the character of land, and the showing must be strong to induce the Department to order a new hearing in such a case. McCharles v. Roberts, 20 L. D. 564.

33. Where, on testimony submitted at a hearing, it is finally decided that land is non-mineral in character, a hearing will not be ordered on the protest of another claimant who set up nothing not considered in the first contest. Departmental decision of June 18, 1896, *In re* Spitzler v. Koch.

34. Where land returned as mineral is decided, upon a hearing had, to be non-mineral, the burden thereafter is upon one alleging its mineral character to show it as a present fact. Kane v. Devine, 7 L. D. 532.

35. Where the land covered by a mining claim is adjudged mineral, a new hearing to determine the character of the land will not be ordered unless such claim be alleged to have been abandoned. McCharles v. Roberts, 20 L. D. 564.

36. In all controversies affecting the character of public land the government is a party in interest, and a mere technicality, such as the form of an appeal, will not be allowed to interfere with the determination of the questions involved. Dickinson v. Capen, 17 C. L. O. 100.

37. In a controversy to determine the character of the land the government is a party in interest. Caledonia M. Co. v. Rowen, 2 L. D. 719; Magalia G. M. Co. v. Ferguson, 3 L. D. 234.

2. *Return.*

38. The return by the United States Surveyor General as to the character of the land is of but slight value and should not be given undue weight. Winscott v. N. P. R. R. Co., 17 L. D. 274.

39. Where land returned as agricultural in character has been embraced in a *prima facie* valid mineral application, the slight presumption raised by the return of the United States Surveyor General is overcome and the burden of proof is on one alleging its agricultural character. N. P. R. R. Co. v. Marshall, 17 L. D. 545.

40. The return of the United States Surveyor General is not conclusive as to the mineral character of land. Gold Hill Qtz. M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

41. The return of lands as saline is not conclusive of their character, and if disproven they are subject to agricultural entry. Cole v. Markley, 2 L. D. 847.

42. A return by the United States Deputy Surveyor as to the character of land, whether mineral or non-mineral, has the weight and effect only of a deposition. Kirby v. Lewis, 39 Fed. Rep. 75; Winscott v. N. P. R. R. Co., 17 L. D. 274.

43. The return of land as mineral by the United States Deputy Surveyor, and the approval of the survey by the United States Surveyor General and by the General Land

Office, is *prima facie* proof of its mineral character. Johnston v. Morris, 72 Fed. Rep. 890.

44. The report of the surveyor as to the character of the land is sufficient in the absence of anything bringing in question the *bona fides* of the claimant, or tending to show that the ground added by the amendment is valuable, or is sought for any other than mining purposes. Lincoln Placer, 7 L. D. 81.

45. The non-mineral character of land must be shown after it has been returned as mineral, before an agricultural entry is allowed therefor. McGurk v. Waters, 10 C. L. O. 87.

46. Clear and positive proof alone can overcome the mineral return of land near valuable mines. Town Site of North Leadville v. Searl, 7 C. L. O. 36.

47. The presumption raised by the mineral return of public lands will remain until disproven by testimony. Central Pacific R. R. Co., 13 C. L. O. 218.

3. *Burden of Proof.*

(See EVIDENCE, p. 401.)

48. The burden of proof is on one attacking the return of lands by the United States Surveyor General. Nita v. State of Wisconsin, 9 L. D. 385.

49. The burden of proof is upon one attacking the *prima facie* agricultural character of the land. Savage v. Boynton, 12 L. D. 612.

50. The burden of proof is upon an agricultural claimant for land returned as mineral, but the presumption as to the character of the land is not forcible where it appears that, after long-continued mining operations over a considerable part of the land, it has been abandoned by mineral claimants as no longer profitable. Cutting v. Reininghaus, 7 L. D. 265.

51. The burden of proof in this case rests on the agricultural claimant, but he may show that he has improved the tracts and used them for agricultural purposes, and that "there have been no valuable mines of gold, silver, cinnabar or copper discovered thereon." Utter v. Boston Hydr. G. M. Co., 14 C. L. O. 257.

52. Where land is returned as mineral the burden is upon an agricultural claimant to show that it is non-mineral, but he is not bound to prove it to be valuable for agriculture. Mulligan v. Hansen, 10 L. D. 311.

53. The allowance of a mineral entry on land returned by the United States Surveyor General as agricultural overcomes the presumption raised by such return, and the burden of proof is thereafter upon one alleging the non-mineral character of the land. Walton v. Batten, 14 L. D. 54.

54. Where land is returned as mineral in character by the United States Surveyor General, and is entered by a homestead claimant who files his non-mineral affidavit, an affidavit of a mineral claimant alleging its mineral character will offset the agricultural claimant's non-mineral affidavit, and place the burden of proving the non-mineral character upon him. Dickinson v. Capen, 14 L. D. 426.

55. Where land returned as agricultural in character has been embraced in a *prima facie* valid mineral application, the slight presumption raised by the return of the United States Surveyor General is overcome, and the burden of proof is on one alleging its agricultural character. N. P. R. R. Co. v. Marshall, 17 L. D. 545.

56. The report of a United States Deputy Mineral Surveyor who examines a placer mining claim in his official capacity, which shows the land to be mineral in character, overcomes the slight presumption raised by its return by the United States Surveyor General as agricultural in character, and places the burden of proof upon one alleging its non-mineral character. State of Washington v. McBride, 18 L. D. 199.

57. Land was returned as non-mineral in character and was entered by cash entry as such. Subsequently the surveys of the township were suspended. A hearing was ordered on a contest by a mineral contestant to determine the character of the land at the date of the cash entry. Before trial a new public survey was approved, returning the land as mineral in character. *Held*, that the burden of proof was upon the agricultural claimant to show the land not to have been known to be mineral at date of his entry. Aspen Cons. M. Co. v. Williams, 23 L. D. 34. (Following Johns v. Marsh, 15 L. D. 196, as to actual mining operations not being necessary.)

58. When land has been returned as agricultural in character on the township plats,

but the township is afterwards withdrawn as mineral land, the burden of proof is upon the agricultural claimant to show its non-mineral character. Mull v. Ross, 4 C. L. O. 19.

59. Where land is returned as agricultural in character, and is so claimed, the burden of proof is upon one alleging its mineral character. Hooper v. Ferguson, 2 L. D. 712; Caledonia M. Co. v. Rowen, 2 L. D. 714; Dughi v. Harkins, 2 L. D. 721.

60. As the land in question was returned as agricultural, and has never been withdrawn as mineral land, the burden of proof is upon the placer claimant to prove its mineral character. Hunt v. Bartholomew, 10 C. L. O. 293.

61. The burden of proof, where land is returned as agricultural, is upon the mineral claimant, and he must show, not that the land in the neighborhood is mineral, and that theoretically the land in dispute must contain mineral, but that it actually does produce mineral. Dughi v. Harkins, 2 L. D. 721.

62. After lands had been set apart and designated as agricultural land, they were *prima facie* of that character, and the burden of proof is upon him who traverses such character. Caledonia M. Co. v. Rowen, 2 L. D. 714.

63. Where land is returned as agricultural, and is claimed as such, the burden is upon a mineral contestant to show its mineral character. Roberts v. Jepson, 4 L. D. 60.

64. Where land is within a well-known mineral locality, the presumption before its survey is that it is mineral in character. Town Site of Deadwood, 8 C. L. O. 18.

65. Where the land was returned as agricultural in character, and is claimed as such, the question "is not whether the land is mineral in character, but whether the mineral character is such as to make the land more valuable for mining than for agricultural purposes or whether the mineral character is shown to be such as to warrant the conclusion that the minerals might be obtained with the aid of known means and appliances in sufficient quantities and of such values as to make it more valuable for mining than for agricultural purposes." Creswell M. Co. v. Johnson, 8 L. D. 440.

66. The burden of proving the land more valuable for mining than for agricultural purposes, as a fact, is upon one attacking an original homestead entry of land returned by the United States Surveyor General as agricultural. Winters v. Bliss, 14 L. D. 59.

67. Where land has been returned by the United States Surveyor General as agricultural in character, and it is claimed as such, the burden is on a mineral claimant to show, as a present fact, that the land is more valuable for mining than for agricultural purposes. Dobler v. N. P. R. R. Co., 17 L. D. 103.

68. Where land is returned as agricultural, and is claimed as such, the burden is upon one alleging its mineral character to prove, not that some mineral has been found thereon, but that it can be mined at a profit. Departmental decision of May 14, 1896, *In re* Quigley v. State of California.

4. *Proof.*

(See EVIDENCE, p. 401.)

69. Where land was returned as agricultural in character, the burden is upon one alleging its mineral character to show, "not that neighboring or adjoining lands are mineral in character or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that as a present fact, it is mineral in character, and this must appear from the actual production of mineral, and not from any theory that it may produce it. * * * He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value." Dughi v. Harkins, 2 L. D. 721.

70. In contests between agricultural and mineral claimants, the mineral claimant must show that valuable mines have been discovered. Carron v. Curtis, 5 C. L. O. 8.

71. The actual finding of mineral on the land must be shown before its mineral character will be recognized. Commissioners of Kings County v. Alexander, 5 L. D. 126.

72. Where land returned as non-mineral is claimed under the agricultural law, the burden is upon one alleging its mineral character to show that it is mineral in character as a present fact, not that adjoining tracts are such. Magalia Gold M. Co. v. Ferguson, 6 L. D. 218.

73. In a hearing to determine the character of land, the mineral claimant need not show

any profits resulting from mining operations thereon. Caledonia M. Co. v. Rowen, 2 L. D. 714.

74. The existence of mineral in such quantities as to justify expenditures in the effort to secure it should be established as a present fact in order to bring the land within the class subject to mineral entry. John Downs, 7 L. D. 71.

75. Where land is *prima facie* agricultural in character, the one alleging its mineral character must establish it by the actual production of mineral upon the land, not merely by proof of the existence of mineral on adjoining tracts, and it must appear that the land is more valuable for mineral than for agricultural purposes. Savage v. Boynton, 12 L. D. 612.

76. On issue joined as to the character of the land, the question to be determined is whether as a present fact it is mineral land, and more valuable for mining than for agriculture. Cutting v. Reininghaus, 7 L. D. 265; Creswell M. Co. v. Johnson, 8 L. D. 440; Peirano v. Pendola, 10 L. D. 536.

77. To stamp land as mineral in character, mineral must be actually found thereon, and a mere theory as to its existence will not be accepted as establishing its mineral character. Walton v. Batten, 14 L. D. 54.

78. Land, to be enterable under the mineral land law, must be shown to contain mineral in such quantities as will render profitable the working of the claim. It must, under the placer law, contain a valuable deposit. Royal K. Placer, 13 L. D. 86.

79. An applicant for a mineral patent must show the land claimed to contain valuable mineral, and that the improvements upon the claim tend to its development. John Downs, 7 L. D. 71.

80. The mineral character of land may be established by proof of the existence of mineral therein in paying quantities, and the actual operation of a mine on the land is not necessary to show the fact, as it may be demonstrated by experiment, prospecting and "panning." Johns v. Marsh, 15 L. D. 196.

81. In determining the character of land alleged to be chiefly valuable for coal, if coal has been *actually* produced, the probable extent of the deposit may be shown by testimony of expert geologists and miners. Rucker v. Knisley, 14 L. D. 113.

82. Land may be proven to be mineral in character without proof of the actual discovery of valuable deposits thereon, as by the fact that it is in the center of a valuable mineral belt, surrounded by valuable mines, that money is being spent preliminary to working it, and that the agricultural claimant has boasted of its mineral character. Pulliam v. Hunter, 2 C. L. O. 180.

83. The burden of proof, where land is returned as agricultural, is upon the mineral claimant, and he must show, not that the land in the neighborhood is mineral and theoretically the land in dispute must contain mineral, but that it actually does produce mineral. Dughi v. Harkins, 2 L. D. 721.

84. A mineral claimant who contests an agricultural entry, alleging the mineral character of the land, must prove that the land contains mineral of commercial value and of an extent which would justify an expenditure of money in its development. This cannot be proved by showing the production of mineral from neighboring tracts. Departmental decision of March 16, 1896, *In re* Brown v. Schmidt.

85. The mere fact that portions of the land contain particles of gold-bearing quartz would not necessarily impress it with the character of mineral land within the meaning of the statute. Alford v. Barnum, 45 Cal. 482; 10 Mor. Min. Rep. 422; Cutting v. Reininghaus, 7 L. D. 265; Etling v. Potter, 17 L. D. 424.

86. "But in determining the question of whether the land is mineral or not, such contingencies, possibilities, or even probabilities cannot be considered. * * * The statute does not reserve any land from entry as a homestead simply because some one is foolish or visionary enough to claim or work some portion of it as mineral ground, without reference to the fact whether there are any paying mines on it or not." United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 482.

87. As between mineral claimants, when it is alleged by one that the lode claim of the other was not based on a valid discovery prior to location, it is no part of the defense to show the existence of a valuable deposit of mineral. The value of the mineral deposit is a matter into which the government does not inquire after discovery and location, save in controversies between mineral and agri-

cultural claimants. Tam v. Story, 21 L. D. 449.

88. The existence of a known lode is a question of fact for the jury. "It cannot be said, as a matter of law in advance, how much gold or silver must be found in a vein before it will justify exploitation and be properly called a known vein." Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394.

89. Assays made from samples are but slight evidence of the value of the vein from which the samples are taken. Cheesman v. Shreeve, 40 Fed. Rep. 787; Dobler v. Northern Pacific R. R. Co., 17 L. D. 103.

90. The mineral claimant's duty is to show the non-agricultural character of the land as well as its value for minerals. He must also prove that it is more valuable for mining than for agricultural purposes. Caledonia M. Co. v. Rowen, 2 L. D. 714.

91. Proof of the sale of a mining claim two years after the issuance of the town site patent is not evidence of the known mineral value of the land at the date of said patent. Richards v. Dower, 81 Cal. 44; 22 Pac. Rep. 304. See S. C., 161 U. S. 658.

92. Where land was returned as agricultural and is so claimed, a mineral claimant must show it to be more valuable for mineral than for agricultural purposes. Tinkham v. McCaffrey, 13 L. D. 517.

93. When mineral has been discovered upon the land in question, the value and extent of mineral deposits on neighboring tracts are proper matters for consideration as tending to show the value of the mineral deposit discovered upon the land involved. Santa Clara M. Ass'n v. Scorsur, 4 L. D. 104; Rucker v. Knisley, 14 L. D. 113; Hamilton v. Anderson, 19 L. D. 168.

94. Proof of the mineral character of the land must be of the actual production of mineral thereon, not that adjoining lands are of that character, nor that the land in question may hereafter develop mineral. Commissioners of Kings County v. Alexander, 5 L. D. 126.

95. The mere proximity of tracts containing coal does not stamp the land on which no coal has been found as coal land. Scott v. Sheldon, 15 L. D. 361.

96. The fact that land lies in a mineral belt and that neighboring tracts contain mineral does not show the land to be mineral in character. Warren v. State of Colorado, 14 L. D. 681.

97. A coal claimant, contesting an original homestead entry, must show the land to be valuable for coal deposits by actual production of the coal. Jones v. Driver, 14 L. D. 514.

98. The proximity of land to coal veins will not warrant the conclusion that it is mineral in character, where it is not returned as such, and its mineral character is not made to appear as a present fact. John E. Williams, 11 L. D. 462.

99. In determining the value of land claimed to be valuable for coal, the fact that adjoining tracts are known to contain valuable deposits of coal may be considered in connection with the fact that coal has been discovered upon the land in question. Departmental decision of May 23, 1896, *In re* Seifred v. Minnelli.

100. "Probably in a majority of cases where a placer claim is located, other matters than the existence of valuable deposits of mineral enter into the estimate of its worth. Its accessibility to places where supplies and medical attendance can be obtained for the men engaged in working upon it, and timber secured to support the drifting or tunneling which may be necessary; the facility with which water can be brought to wash the mineral from the earth, sand or gravel, with which it may be mingled; and the uses to which the land may be subjected when the claim is exhausted, may be proper subjects of consideration." United States v. Iron Silver M. Co., 128 U. S. 673. See 24 Fed. Rep. 568.

101. In determining whether or not land is more valuable for mining than for agricultural purposes, physical difficulties to the successful working of the land as a mine may be considered. State of Washington v. McBride, 18 L. D. 199.

102. In a hearing to determine the character of land, the mineral claimant may submit testimony as to its non-agricultural character, that a comparison may be drawn between its agricultural and mineral values. Caledonia G. M. Co. v. Rowen, 2 L. D. 714.

103. *Ex parte* affidavits with no opportunity for cross-examination should not be entertained in contested mining cases. France v. Harrison, 5 C. L. O. 66.

5. *Mineral.*

104. If the land contains gold or other valuable deposits in loose earth, sand or gravel, which can be secured at a profit, it is enterable under the placer mining laws, regardless of other valuable qualities it may possess, such as timber, or the uses besides mining to which it may be put. United States v. Iron Silver M. Co., 128 U. S. 673. See 24 Fed. Rep. 568.

105. Land shown to contain mineral in sufficient quantities to justify a reasonable person in spending money and labor for its extraction is mineral in character, and as such excepted from the grant to the Northern Pacific Railroad Company. Casey v. N. P. R. R. Co., 15 L. D. 439.

106. Land which is known as a present fact to contain mineral in such quantities as will justify expenditures to obtain the same is mineral land. Departmental decision of March 27, 1896, *In re* Hull v. Livesay.

107. Land known to contain mineral in such quantity as will justify expenditure to obtain it, at date of a final homestead entry, may not be patented to the homestead claimant. Departmental decision of May 20, 1896, *In re* Porter v. Scannell.

108. "It is my opinion that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine," the land is mineral in character, and will be awarded the mineral claimant. Castle v. Womble, 19 L. D. 455.

109. Land chiefly valuable for deposits of building stone of fine quality is mineral in character, and not subject to entry under the agricultural land laws. McGlenn v. Wienbroeer, 15 L. D. 370. *Contra*, Departmental Instructions of Aug. 29, 1896.

110. Coal lands are mineral lands, and are to be acquired only under laws specifically applicable thereto. Mullan v. United States, 118 U. S. 271. (Affirming United States v. Mullan, 7 Sawy. 466; 10 Fed. Rep. 785.)

111. Land is mineral in character if it contains mineral (coal) in paying quantities, and the present remoteness of the land from lines of transportation is immaterial. Smith v. Buckley, 15 L. D. 321.

112. Land on which is found mineral of commercial value is enterable under the mineral land laws, regardless of the fact that from lack of transportation facilities the mineral cannot at the present time be put upon the market. Departmental decision of March 24, 1896, *In re* Smith v. Wallace.

113. Land valuable for deposits of mineral-bearing tailings may (apparently) be located as a mining claim. Rogers v. Cooney, 7 Nev. 213.

6. *Non-mineral.*

114. The mere presence of minerals in unascertained quantities does not make a given spot a mine. Mullan v. United States, 118 U. S. 271; Ah Yew v. Choate, 24 Cal. 562; 1 Mor. Min. Rep. 492; Alford v. Barnum, 45 Cal. 482; 10 Mor. Min. Rep. 422; Westmoreland Coal Co.'s Appeal, 85 Pa. 346; Bell v. Wilson, L. R. 1 Ch. App. 308.

115. The fact that land contains some gold will not except it from entry under the agricultural land laws if it is more valuable for agricultural than for mining purposes. United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 482.

116. It is not sufficient to constitute "known mines" of coal, within the meaning of the statute, that there should be merely indications of coal beds or coal fields of greater or less extent and value as shown by outcroppings. To constitute the exemption contemplated by the pre-emption act under the head of "known mines," there should be upon the land ascertained coal deposits of such extent and value as to make the land more valuable as a coal mine than for agricultural purposes. Colorado Coal & Iron Co. v. United States, 123 U. S. 307.

117. "It is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation." United States v. Iron S. M. Co., 128 U. S. 673. (Affirming 24 Fed. Rep. 568; approved in Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394.)

118. "The fact that there may be small quantities of gold in it not in sufficient quan-

tities to warrant miners to work it, would not prevent the homestead claimant from taking it as agricultural land." Etling v. Potter, 17 L. D. 424.

119. To be excepted from an agricultural entry, land must be known at date of entry "to be so valuable for their minerals as to justify expenditure for their extracting." Davis' Adm'r v. Weibbold, 139 U. S. 507; S. C., 7 Mont. 107.

120. Lands containing minerals, but not in "such quantities as to justify expenditures in the effort to extract them," are not mineral lands within the laws of the United States. Deffeback v. Hawke, 115 U. S. 392.

121. The fact that land contains a thick vein of coal does not stamp it as mineral in character, where it is shown that the coal cannot be profitably mined. Departmental decision of May 20, 1896, *In re* Green v. Grumbler.

122. The fact that land has been located as a mining claim is not, in itself, proof of the mineral character of the land, especially where the burden of proof is upon the mineral claimant. Etling v. Potter, 17 L. D. 424.

123. Land is not mineral if it will not pay to work by the ordinary methods of mining, as a present fact. Cuttings v. Reininghaus, 7 L. D. 265.

124. The fact that mineral (petroleum) has been discovered on adjoining tracts is not proof of the mineral character of the land. Roberts v. Jepson, 4 L. D. 60.

125. "Many springs and many waters are impregnated with mineral held in solution; but it does not follow that the lands bearing such waters are mineral lands, and can be patented as such. Lands of a saline character are an exception, and are expressly provided for in the laws relating to the disposition of the public lands. Lands containing mineral springs not of a saline character are subject to sale under the general laws, and not under the acts relating to the sale of mineral lands." Pagosa Springs, 1 L. D. 562.

126. To be reserved from sale under the agricultural land laws as mineral, lands must be capable of being profitably worked for mineral by the usual modes of mining. Departmental decision, *In re* Deadwood Town [illegible]

7. *Discovery.*

(See DISCOVERY, p. 36.)

127. In the matter of discovery, the spirit of the statute is satisfied by the discovery of mineral deposits of such value as to at least justify the exploration of the lode in expectation of finding ore sufficiently valuable to work. Shreve v. Copper Bell M. Co., 11 Mont. 309; 28 Pac. Rep. 315. (Davis' Adm'r v. Weibbold, 7 Mont. 107; 139 U. S. 507, distinguished.)

128. Before land may be patented under the mineral land laws "there must be a discovery of the mineral and a sufficient exploration of the ground to show this fact beyond question." United States v. Iron Silver M. Co., 128 U. S. 673. See 24 Fed. Rep. 568.

129. The value of mineral discovered in a mining claim will not be inquired into by the Land Department, except in a controversy between mineral and agricultural claimants as to the character of the land. Tam v. Story, 21 L. D. 440.

8. *Location.*

(See LOCATION, p. 77.)

130. The location of a mining claim, *prima facie* valid, raises the presumption of the mineral character of the land. Sweeney v. N. P. R. R. Co., 20 L. D. 394.

131. A certificate of location of a mining claim cannot be accepted in a contested case as establishing the mineral character of land in the absence of evidence of an actual discovery of mineral. Etling v. Potter, 17 L. D. 424.

132. The location of a mineral claim on land returned as agricultural in character will rebut the presumption raised by the return and place the burden upon an agricultural claimant of proving its non-mineral character. N. P. R. R. Co. v. Marshall, 17 L. D. 545.

133. The fact that land was once embraced in a mining location, since abandoned, is not proof of its mineral character, which must appear as a present fact. Berry v. C. P. R. R. Co., 15 L. D. 463.

134. The location of a mining claim is warranted where mineral is discovered such as would justify a person of ordinary prudence in expenditure of labor and means to

develop the claim. Castle v. Womble, 19 L. D. 455.

135. "Such matter must bear one or more of the metals named in the statute before a mine that has been discovered can be located under the law." Territory v. Mackey, 8 Mont. 168; 19 Pac. Rep. 395.

136. "Valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following in expectation of finding ore." Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362. See S. C., 111 U. S. 350.

9. *Entry.*

(See ENTRY, p. 239.)

137. A mineral entry will be canceled when it appears that the claim is not known to be valuable for mineral and is not taken for mining purposes. Trickey Placer, 7 L. D. 52.

138. Land, to be subject to entry under the placer law, must be shown to be placer mining land as a fact. Searle Placer, 11 L. D. 441.

139. A hearing to determine the mineral or non-mineral character of land should not be ordered in the absence of an application to enter it. C. P. R. R. Co., 8 L. D. 30; 9 L. D. 613.

140. The allowance of mineral entry is an adjudication of the mineral character of the land entered, and the burden of proof is thereafter upon one who alleges its non-mineral character. Johns v. Marsh, 15 L. D. 196.

141. Where a mineral entry has been allowed upon a satisfactory showing of the mineral character of the land, a hearing will not be ordered on the protest of an agricultural claimant, unless it be alleged that the land was agricultural in character at date of filing of mineral application for patent. Houghton v. McDermott, 15 L. D. 509.

142. A preference right of entry will be accorded an agricultural contestant who secures the cancellation of a mineral entry because of the non-mineral character of the land. Dornen v. Vaughn, 16 L. D. 8.

10. *Agricultural.*

(See AGRICULTURAL CLAIM, p. 376.)

143. "Thus read they must be held, we think, merely to prohibit the passage of title under the provisions of the town site laws, to mines of gold, silver, cinnabar or copper, which are known to exist, on the issue of the town site patent, and to mining claims and mining possessions, in respect to which such proceedings have been taken under the law or the custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The exceptions of mineral lands from pre-emption and settlement and from grants to States for universities and schools, for the construction of public buildings and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify the expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining States which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral' in the sense of this statute is applicable." Davis' Adm'r v. Weibbold, 139 U. S. 507. (Citing and approving Alford v. Barnum, 45 Cal. 482; 10 Mor. Min. Rep. 422; Merrill v. Dixon, 15 Nev. 401; Cowell v. Lammers, 10 Sawy. 246; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348; United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486; Dughi v. Harkins, 2 L. D. 721; Cleghorn v. Bird, 4 L. D. 478; Samuel W. Spong, 5 L. D. 193; Commissioners of Kings County v. Alexander, 5 L. D. 126; Magalia G. M. Co. v. Ferguson, 6 L. D. 218; Nicholas Abercrombie, 6 L. D. 393; John Downs, 7 L. D. 71; Cutting v. Reininghaus, 7 L. D. 265; Creswell M. Co. v. Johnson, 8 L. D. 440; Thomas J. Laney, 9 L. D. 83.)

144. To be excepted from a final homestead entry as mineral, land must have been known at date of such entry to be mineral in character and more valuable therefor than for agricultural purposes. The discovery that land is valuable for coal, after final homestead entry, will not reserve it from patenting under the homestead entry. Nicholas Abercrombie, 6 L. D. 393.

145. To defeat a final homestead entry a mineral contestant must show that, at date of such entry, the land was known to be more

valuable for mining than for agricultural purposes. Creswell M. Co. v. Johnson, 8 L. D. 440.

146. "To constitute the exemption contemplated by the pre-emption act under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. * * * A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not 'known mines,' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed." Colorado Coal & Iron Co. v. United States, 123 U. S. 307.

147. No title from the United States to land known at the time of sale to be valuable for its minerals can be obtained under the pre-emption or homestead or the town site laws, or in any other way than as prescribed by the laws, especially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas. Deffeback v. Hawke, 115 U. S. 392; Sparks v. Pierce, 115 U. S. 408.

148. To be reserved from entry under the agricultural land laws and from patent issued under said laws, land must have been *known* at the time of sale (entry) to be valuable for its minerals. A discovery of its mineral character subsequent to that date cannot affect the title. Deffeback v. Hawke, 115 U. S. 392.

149. To be excepted from an agricultural patent land must have been known to be more valuable for mineral than for agricultural purposes at date of agricultural entry. Development after entry is immaterial. United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486; Boggs v. Merced M. Co., 14 Cal. 279; 10 Mor. Min. Rep. 334; S. C., 3 Wall. 304; Hunt v. Steese, 75 Cal. 620; 17 Pac. Rep. 920.

150. Though land, to be excepted from a pre-emption entry as mineral, must have been known to be such at date of pre-emption entry (Harnish v. Wallace, 13 L. D. 108), it need not necessarily have been known to the pre-emption entryman if its mineral character was a matter or general knowledge. Tinkham v. McCaffrey, 13 L. D. 517.

151. As the pre-emption cash entry was made June 17, 1885, and the entryman disposed of the land prior to March 1, 1888, and the protest that the tract contains gold was not filed until after March 3, 1891, the motion for a hearing is denied and the protest is dismissed. John F. Delaney, 18 C. L. O. 72.

152. A contestant against a pre-emption entry who alleges the land to have been known to be mineral at date of pre-emption entry has the burden of proving that it was more valuable for mining than for agricultural purposes. Tinkham v. McCaffrey, 13 L. D. 517.

153. To be excepted from a pre-emption entry as mineral, land must be known to be such at date of the agricultural entry. A discovery of mineral after pre-emption entry of the land would not defeat the pre-emption entry. Harnish v. Wallace, 13 L. D. 108.

154. The known character of land at the date of final homestead entry determines whether or not it should be excluded from the homestead claim because of its mineral character, the discovery of mineral subsequent to such final entry being immaterial. Rea v. Stephenson, 15 L. D. 37.

155. In view of the provisions of the act of March 3, 1891, a motion to suspend a pre-emption cash entry, in view of recent discovery of valuable minerals in the land involved, is denied. United States v. Lendrecie, 18 C. L. O. 65.

156. When mineral is discovered on land after the tract has been embraced in a homestead entry, only twenty-five feet on each side of a vein can be embraced in a mining claim, unless, for the purpose of saving the expense of a segregation survey, the homestead claimant shall allow ten acres or twenty acres to be embraced thereby. Ryan v. Buivert, 14 C. L. O. 288.

157. Land, to be excepted from an agricultural entry as mineral, must be shown to be such as a *present* fact. Scott v. Sheldon, 15 L. D. 361.

158. The discovery of the mineral character of land covered by a homestead claim, at any time prior to final entry, will defeat the same. Jones v. Driver, 14 L. D. 514.

159. A discovery of the mineral character of land embraced in an original homestead entry will defeat the entry. Dickinson v. Capen, 14 L. D. 426.

160. The character of land (whether mineral or non-mineral) embraced in a homestead claim may be questioned up to the date of final entry. A discovery of its mineral character between submission of defective final proof and date of final entry will defeat the homestead claim. Spratt v. Edwards, 15 L. D. 290.

161. The rights of an agricultural claimant will not be affected by a discovery of mineral after final agricultural entry. Arthur v. Earle, 21 L. D. 92.

162. Mineral land, to be excepted from an agricultural patent, must have been known to be such at date of the agricultural claimant's entry and payment for the land. Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348.

163. If a lode is not known at date of agricultural entry, but is subsequently discovered and located, the claimant may not follow it on its dip under the agricultural claim. Amador-Medean G. M. Co. v. South Spring Hill G. M. Co., 13 Sawy. 523; 36 Fed. Rep. 668.

164. A mineral application should not be received for land covered by a homestead entry, but, upon its tender, a hearing should be ordered to determine the character of the land. (In this case the erroneously filed application was allowed to stand pending such a hearing.) Hooper v. Ferguson, 2 L. D. 712; Cleghorn v. Bird, 4 L. D. 478.

165. A miner who enters upon land in the possession of another as agricultural must justify his entry by showing that the land is public land, that it contains minerals, and that he enters for the *bona fide* purpose of mining. Such justification must be pleaded affirmatively in the answer, with all the requisite averments to show a right under the statute or by law to enter. Lentz v. Victor, 17 Cal. 271; 12 Mor. Min. Rep. 211.

166. An agricultural settler upon mineral lands settles subject to the right of miners. Miners may extract minerals in the most practical way, and with the least injury to the occupying claimant. McClintock v. Bryden, 5 Cal. 97 (1855), 63 Am. Dec. 87; Clark v. Duval, 15 Cal. 85 (1859–60).

167. Open and notorious possession for mining is sufficient to charge an applicant for agricultural patent with notice of the mineral character of the land, and to bring such land within the description of "known mineral deposits." Gold Hill Qtz. M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

168. "When an application to enter agricultural land is made, if the locators of mining claims on the land have any objections, they must be vigilant in presenting them. The rules and regulations provide ample means for this purpose, and if the remedies are not pursued, the mineral claimants will not be heard to complain." Departmental decision of March 11, 1896, *In re* Caribou Lode.

169. Lands in Florida claimed prior to April 1, 1890, under the homestead or preemption laws, and not known to be valuable for phosphate deposits at date of such claim, may be entered under such laws notwithstanding a subsequent discovery of such deposits. (Act of Oct. 1, 1890, 26 Stat. 663.) Gary v. Todd, 18 L. D. 58.

11. *Grants.*

(See GRANT, p. 364.)

170. "The policy of Congress as expressed in its numerous grants of public lands to aid in the construction of railroads has always been to exclude the mineral lands from them, and reserve them for special disposition, as seen in the following acts among others: Acts of July 1, 1862, C. 120, 12 Stat., 489, and of July 2, 1864, C. 216, 13 Stat., 356, making grants to the Union and Central Pacific Companies; Act of July 4, 1866, C. 165, 14 Stat., 83, making a grant to the Iron Mountain Railroad Company; Act of July 13, 1866, C. 182, 14 Stat., 94, making a grant to the Placerville, etc., Railroad; Act of July 25, 1866, C. 242, 14 Stat., 239, making a grant to the California and Oregon Railroad, sections 2 and 10; Act of July 27, 1866, C. 278, 14 Stat., 292, making a grant to the Atlantic and Pacific Railroad and to the Southern Pacific Railroad; Act of March 2, 1867, C. 189, 14 Stat., 548, making a grant to the Stockton and Copperopolis Railroad; Act of March 3, 1871, C. 122, 16 Stat., 573, making

a grant to the Texas Pacific Railroad." Barden v. N. P. R. R. Co., 154 U. S. 288.

171. Where application is made for a lode claim lying partly within and partly without an odd-numbered section within the grant to the Northern Pacific Railroad Company, and the discovery is situate upon the latter portion, a hearing will be ordered to determine the question of the mineral or non-mineral character of the former portion. Departmental decision of Sept. 23, 1892, *In re* Zero Lode.

172. If land within the limits of the grant to the Northern Pacific Railroad Company (from which all minerals other than coal and iron were excepted) is discovered to be mineral in character at any time before the issuance of patent therefor to the company, it is excepted from the grant. Barden v. N. P. R. R. Co., 154 U. S. 288. (Citing and approving C. P. R. R. Co. v. Valentine, 11 L. D. 238—strong dissenting opinion.)

173. The discovery of the mineral character of land at any time prior to issuance of patent therefor under a grant excepting mineral land will exempt the land from the operation of the grant. Central Pacific R. R. Co. v. Valentine, 11 L. D. 238; North Star M. Co. v. Central Pacific R. R. Co., 12 L. D. 608; Southern Pacific R. R. Co. v. Allen G. M. Co., 13 L. D. 165; Northern Pacific R. R. Co. v. Champion Cons. M. Co., 14 L. D. 699; O'Conner v. Northern Pacific R. R. Co., 15 L. D. 247; Winscott v. Northern Pacific R. R. Co., 17 L. D. 274; Northern Pacific R. R. Co. v. Marshall, 17 L. D. 545.

174. Lands not known to be mineral in character at the date of issuance of patent therefor to a railroad company pass by the patent, even though the grant to the company excluded mineral land. Samuel W. Spong, 5 L. D. 198.

175. To be excepted from a railroad grant, land must have been known to be such at date of filing of map of general route. Francoeur v. Newhouse, 40 Fed. Rep. 618; 43 Fed. Rep. 238; Valentine v. Valentine, 47 Fed. Rep. 597. *Contra*, Central Pacific R. R. Co. v. Valentine, 11 L. D. 238; Barden v. Northern Pacific R. R. Co., 154 U. S. 288.

176. The act of February 26, 1895, providing for the classification of lands within the grant to the Northern Pacific Railroad Company (in the States of Idaho and Montana) with respect to their mineral or non-mineral character does not suspend the authority of the Land Department to pass upon pending cases involving that question, nor does it withdraw such lands from appropriation and entry. Sweeney v. Northern Pacific R. R. Co., 21 L. D. 65.

177. A State admitted before the survey of lands is entitled to sections 16 and 36 under its school grants, if they were not known to be mineral at date of the approval of the survey, and a discovery of mineral thereon subsequently will not defeat the right of the State. (The State acquires no rights, however, by an irregular survey which is approved and thereafter suspended.) Virginia Lode, 7 L. D. 459; J. Dartt, 5 C. L. O. 178; Town of Silver Cliff v. State of Colorado, 6 C. L. O. 152; State of Colorado, 6 L. D. 412; State of Colorado, 7 L. D. 490.

178. The right of a State under a school grant attaches, as to non-mineral lands previously surveyed, at date of the admission of the State. As to non-mineral lands surveyed subsequent to the admission of the State, the right attaches at date of approval of the survey. Warren v. State of Colorado, 14 L. D. 681.

179. Land returned by the United States Surveyor General as mineral does not pass to a State under a school land grant. Giovanni Le Franchi, 3 L. D. 229.

180. The mineral or non-mineral character of land in a school section (surveyed before the admission of the State), as known at the date of the admission of the State, determines whether or not it passed to the State under its grant. Boulder and Buffalo M. Co., 7 L. D. 54.

181. If land is known to be valuable for mineral at date of the admission of a State, it cannot pass to the State under its school grant. State of Washington v. McBride, 18 L. D. 199.

182. A grant of land for school purposes to the State does not pass known mineral lands, even though mineral lands were not expressly excepted from the grant. Keystone Lode & Mill Site v. Nevada, 15 L. D. 259.

183. Where a grant of land is made to a State after its admission, the mineral or non-mineral character at date of the subsequent survey thereof determines whether or not it passed to the State under the grant. Pereira v. Jacks, 15 L. D. 273.

184. To be excepted from a grant of school lands to a State, land must have been known to be valuable for mineral, as a fact, at the date of the approval of the survey thereof, when the State was admitted prior to such survey. Frees v. State of Colorado, 22 L. D. 510.

185. One who applies for patent for a lode claim situate in a school section may be allowed to show that the land was known to be mineral in character at the date of the admission of the State, and hence excepted from the grant to the State. Fleetwood Lode, 12 L. D. 604.

186. If lands claimed by a State under the grant excepting mineral lands are discovered to be mineral before certification to the State, they do not pass under the grant. State of California, 7 L. D. 490. (Contrary to other Departmental decisions, and expressly overruled in case of Abraham L. Miner v. State of California, 9 L. D. 408.)

187. Under a grant of school lands, "The State's title vests, if at all, at the date of the completion of the survey. Cooper v. Roberts, 18 How. 173; Virginia Lode, 7 L. D. 459. And, if the land, although in reality mineral, was not then *known* to be mineral, the subsequent discovery of its mineral character would not divest the title which had already passed." Abraham L. Miner v. State of California, 9 L. D. 408.

188. Land returned as mineral in character is not subject to selection by a State as school indemnity land until the return has been overcome by testimony submitted after publication of notice, under paragraph 110 of the Mining Circular, as amended July 2, 1894. (19 L. D. 21.) State of California v. United States, 22 L. D. 402.

12. *Patent.*

(See PATENT, p. 259.)

189. If patent is secured under the placer mining laws for land not containing any placer deposits, for the purpose of securing title to the timber thereon, the United States may maintain a suit to vacate such patent for fraud in its procurement. United States v. Iron Silver M. Co., 128 U. S. 673. See 24 Fed. Rep. 568.

190. When a patent issues under a law which provides for the disposal of land as agricultural, and there is no reservation in the law except a general one of mineral, and none in the patent, the patent is a conclusive adjudication by the government that the land is agricultural, and a court may not thereafter reopen collaterally the question as to the character of the land. Gale v. Best, 78 Cal. 235.

191. To warrant the vacation of a patent issued for mineral land under the agricultural land laws, the misrepresentation as to the character of the land must have been falsely and fraudulently made. A mistake as to the character of the land will not cause the vacation of the patent on the ground of fraud. United States v. Iron Silver M. Co., 24 Fed. Rep. 568. See 128 U. S. 673.

192. A patent issued under the agricultural laws for land known to be mineral will be vacated upon suit by the United States. United States v. Culver, 52 Fed. Rep. 81.

193. A mineral patent renders *res adjudicata*, so far as the Land Department is concerned, the fact that the land was known to be mineral. Blackmore v. Reilly, 17 Pac. Rep. 72.

194. A patent to a railroad company is not conclusive evidence that the land is non-mineral in character. The party claiming under subsequent mining patent may show that the land is mineral, and, upon such showing being made, his title will be declared quieted. Chicago Quartz Mine v. Oliver, 75 Cal. 194.

195. After patent has issued for a town site, a miner may not locate a claim inside the patented limits and then attack the validity of the town site patent on the ground that the land located was known to be mineral at date of the town site entry. The patent must be attacked directly if at all. Carter v. Thompson, 65 Fed. Rep. 329.

196. A patent to a railway company will be set aside if the ground was known at time of patenting to be mineral in character. McLaughlin v. United States, 107 U. S. 526; West. Pacific R. R. Co. v. United States, 108 U. S. 510.

197. If land known to be valuable for mineral is patented to a railroad company under a grant excepting mineral lands, the United States has such an interest in the matter as would warrant the Secretary of the Interior in recommending suit to vacate

to the character as known subsequent to the trial of the case upon which the decision is rendered. Thomas v. Thomasson, 16 L. D. 52.

27. A final decision of the Land Department holding a tract to be non-mineral in character is conclusive up to the date of the hearing, but does not preclude further inquiry based on subsequent development of mineral. Stinchfield v. Pierce, 19 L. D. 12.

28. A decision as to the character of land is conclusive only up to the date of the inquiry on which the decision is based. Zadig v. Central Pacific R. R. Co., 20 L. D. 26; Dargin v. Koch, 20 L. D. 384; McCharles v. Roberts, 20 L. D. 564; Barnstetter v. Central Pacific R. R. Co., 21 L. D. 464.

29. The failure of one mineral contest against an agricultural entry embracing land returned as mineral, and the presentation of satisfactory final proof by the agricultural occupant, will not prevent parties who were not interested in such contest, and who claim to have discovered valuable mineral on the land subsequent to such proceedings, from instituting another contest prior to issuance of patent. Werle v. Murphy, 15 C. L. O. 183.

30. The character of the land can be inquired into at any time prior to the issuance of patent. A prior decision by the Land Department that the land in dispute is mineral land will not prevent another hearing and an opposite decision. Searle Placer, 11 L. D. 441.

31. Where land has been adjudged mineral, an agricultural claimant who shows that mining operations thereon have been abandoned as unprofitable, in the absence of any other showing of the mineral character, is entitled to a decision holding it to be non-mineral. Thomas v. Thomasson, 16 L. D. 52.

32. The burden of proof is upon one attacking a judgment of the Department as to the character of land, and the showing must be strong to induce the Department to order a new hearing in such a case. McCharles v. Roberts, 20 L. D. 564.

33. Where, on testimony submitted at a hearing, it is finally decided that land is non-mineral in character, a hearing will not be ordered on the protest of another claimant who set up nothing not considered in the first contest. Departmental decision of June 18, 1896, *In re* Spitzler v. Koch.

34. Where land returned as mineral is decided, upon a hearing had, to be non-mineral, the burden thereafter is upon one alleging its mineral character to show it as a present fact. Kane v. Devine, 7 L. D. 532.

35. Where the land covered by a mining claim is adjudged mineral, a new hearing to determine the character of the land will not be ordered unless such claim be alleged to have been abandoned. McCharles v. Roberts, 20 L. D. 564.

36. In all controversies affecting the character of public land the government is a party in interest, and a mere technicality, such as the form of an appeal, will not be allowed to interfere with the determination of the questions involved. Dickinson v. Capen, 17 C. L. O. 100.

37. In a controversy to determine the character of the land the government is a party in interest. Caledonia M. Co. v. Rowen, 2 L. D. 719; Magalia G. M. Co. v. Ferguson, 3 L. D. 234.

2. *Return.*

38. The return by the United States Surveyor General as to the character of the land is of but slight value and should not be given undue weight. Winscott v. N. P. R. R. Co., 17 L. D. 274.

39. Where land returned as agricultural in character has been embraced in a *prima facie* valid mineral application, the slight presumption raised by the return of the United States Surveyor General is overcome and the burden of proof is on one alleging its agricultural character. N. P. R. R. Co. v. Marshall, 17 L. D. 545.

40. The return of the United States Surveyor General is not conclusive as to the mineral character of land. Gold Hill Qtz. M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

41. The return of lands as saline is not conclusive of their character, and if disproven they are subject to agricultural entry. Cole v. Markley, 2 L. D. 847.

42. A return by the United States Deputy Surveyor as to the character of land, whether mineral or non-mineral, has the weight and effect only of a deposition. Kirby v. Lewis, 39 Fed. Rep. 75; Winscott v. N. P. R. R. Co., 17 L. D. 274.

43. The return of land as mineral by the United States Deputy Surveyor, and the approval of the survey by the United States Surveyor General and by the General Land

Office, is *prima facie* proof of its mineral character. Johnston v. Morris, 72 Fed. Rep. 890.

44. The report of the surveyor as to the character of the land is sufficient in the absence of anything bringing in question the *bona fides* of the claimant, or tending to show that the ground added by the amendment is valuable, or is sought for any other than mining purposes. Lincoln Placer, 7 L. D. 81.

45. The non-mineral character of land must be shown after it has been returned as mineral, before an agricultural entry is allowed therefor. McGurk v. Waters, 10 C. L. O. 87.

46. Clear and positive proof alone can overcome the mineral return of land near valuable mines. Town Site of North Leadville v. Searl, 7 C. L. O. 36.

47. The presumption raised by the mineral return of public lands will remain until disproven by testimony. Central Pacific R. R. Co., 13 C. L. O. 218.

3. *Burden of Proof.*

(See EVIDENCE, p. 401.)

48. The burden of proof is on one attacking the return of lands by the United States Surveyor General. Nita v. State of Wisconsin, 9 L. D. 385.

49. The burden of proof is upon one attacking the *prima facie* agricultural character of the land. Savage v. Boynton, 12 L. D. 612.

50. The burden of proof is upon an agricultural claimant for land returned as mineral, but the presumption as to the character of the land is not forcible where it appears that, after long-continued mining operations over a considerable part of the land, it has been abandoned by mineral claimants as no longer profitable. Cutting v. Reininghaus, 7 L. D. 265.

51. The burden of proof in this case rests on the agricultural claimant, but he may show that he has improved the tracts and used them for agricultural purposes, and that "there have been no valuable mines of gold, silver, cinnabar or copper discovered thereon." Utter v. Boston Hydr. G. M. Co., 14 C. L. O. 257.

52. Where land is returned as mineral the burden is upon an agricultural claimant to show that it is non-mineral, but he is not bound to prove it to be valuable for agriculture. Mulligan v. Hansen, 10 L. D. 311.

53. The allowance of a mineral entry on land returned by the United States Surveyor General as agricultural overcomes the presumption raised by such return, and the burden of proof is thereafter upon one alleging the non-mineral character of the land. Walton v. Batten, 14 L. D. 54.

54. Where land is returned as mineral in character by the United States Surveyor General, and is entered by a homestead claimant who files his non-mineral affidavit, an affidavit of a mineral claimant alleging its mineral character will offset the agricultural claimant's non-mineral affidavit, and place the burden of proving the non-mineral character upon him. Dickinson v. Capen, 14 L. D. 426.

55. Where land returned as agricultural in character has been embraced in a *prima facie* valid mineral application, the slight presumption raised by the return of the United States Surveyor General is overcome, and the burden of proof is on one alleging its agricultural character. N. P. R. R. Co. v. Marshall, 17 L. D. 545.

56. The report of a United States Deputy Mineral Surveyor who examines a placer mining claim in his official capacity, which shows the land to be mineral in character, overcomes the slight presumption raised by its return by the United States Surveyor General as agricultural in character, and places the burden of proof upon one alleging its non-mineral character. State of Washington v. McBride, 18 L. D. 199.

57. Land was returned as non-mineral in character and was entered by cash entry as such. Subsequently the surveys of the township were suspended. A hearing was ordered on a contest by a mineral contestant to determine the character of the land at the date of the cash entry. Before trial a new public survey was approved, returning the land as mineral in character. *Held*, that the burden of proof was upon the agricultural claimant to show the land not to have been known to be mineral at date of his entry. Aspen Cons. M. Co. v. Williams, 23 L. D. 34. (Following Johns v. Marsh, 15 L. D. 196, as to actual mining operations not being necessary.)

58. When land has been returned as agricultural in character on the township plats,

but the township is afterwards withdrawn as mineral land, the burden of proof is upon the agricultural claimant to show its non-mineral character. Mull v. Ross, 4 C. L. O. 19.

59. Where land is returned as agricultural in character, and is so claimed, the burden of proof is upon one alleging its mineral character. Hooper v. Ferguson, 2 L. D. 712; Caledonia M. Co. v. Rowen, 2 L. D. 714; Dughi v. Harkins, 2 L. D. 721.

60. As the land in question was returned as agricultural, and has never been withdrawn as mineral land, the burden of proof is upon the placer claimant to prove its mineral character. Hunt v. Bartholomew, 10 C. L. O. 293.

61. The burden of proof, where land is returned as agricultural, is upon the mineral claimant, and he must show, not that the land in the neighborhood is mineral, and that theoretically the land in dispute must contain mineral, but that it actually does produce mineral. Dughi v. Harkins, 2 L. D. 721.

62. After lands had been set apart and designated as agricultural land, they were *prima facie* of that character, and the burden of proof is upon him who traverses such character. Caledonia M. Co. v. Rowen, 2 L. D. 714.

63. Where land is returned as agricultural, and is claimed as such, the burden is upon a mineral contestant to show its mineral character. Roberts v. Jepson, 4 L. D. 60.

64. Where land is within a well-known mineral locality, the presumption before its survey is that it is mineral in character. Town Site of Deadwood, 8 C. L. O. 18.

65. Where the land was returned as agricultural in character, and is claimed as such, the question "is not whether the land is mineral in character, but whether the mineral character is such as to make the land more valuable for mining than for agricultural purposes or whether the mineral character is shown to be such as to warrant the conclusion that the minerals might be obtained with the aid of known means and appliances in sufficient quantities and of such values as to make it more valuable for mining than for agricultural purposes." Creswell M. Co. v. Johnson, 8 L. D. 440.

66. The burden of proving the land more valuable for mining than for agricultural purposes, as a fact, is upon one attacking an original homestead entry of land returned by the United States Surveyor General as agricultural. Winters v. Bliss, 14 L. D. 59.

67. Where land has been returned by the United States Surveyor General as agricultural in character, and it is claimed as such, the burden is on a mineral claimant to show, as a present fact, that the land is more valuable for mining than for agricultural purposes. Dobler v. N. P. R. R. Co., 17 L. D. 103.

68. Where land is returned as agricultural, and is claimed as such, the burden is upon one alleging its mineral character to prove, not that some mineral has been found thereon, but that it can be mined at a profit. Departmental decision of May 14, 1896, *In re* Quigley v. State of California.

4. *Proof.*

(See EVIDENCE, p. 401.)

69. Where land was returned as agricultural in character, the burden is upon one alleging its mineral character to show, "not that neighboring or adjoining lands are mineral in character or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that as a present fact, it is mineral in character, and this must appear from the actual production of mineral, and not from any theory that it may produce it. * * * He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value." Dughi v. Harkins, 2 L. D. 721.

70. In contests between agricultural and mineral claimants, the mineral claimant must show that valuable mines have been discovered. Carron v. Curtis, 5 C. L. O. 8.

71. The actual finding of mineral on the land must be shown before its mineral character will be recognized. Commissioners of Kings County v. Alexander, 5 L. D. 126.

72. Where land returned as non-mineral is claimed under the agricultural law, the burden is upon one alleging its mineral character to show that it is mineral in character as a present fact, not that adjoining tracts are such. Magalia Gold M. Co. v. Ferguson, 6 L. D. 218.

73. In a hearing to determine the character of land, the mineral claimant need not show

any profits resulting from mining operations thereon. Caledonia M. Co. v. Rowen, 2 L. D. 714.

74. The existence of mineral in such quantities as to justify expenditures in the effort to secure it should be established as a present fact in order to bring the land within the class subject to mineral entry. John Downs, 7 L. D. 71.

75. Where land is *prima facie* agricultural in character, the one alleging its mineral character must establish it by the actual production of mineral upon the land, not merely by proof of the existence of mineral on adjoining tracts, and it must appear that the land is more valuable for mineral than for agricultural purposes. Savage v. Boynton, 12 L. D. 612.

76. On issue joined as to the character of the land, the question to be determined is whether as a present fact it is mineral land, and more valuable for mining than for agriculture. Cutting v. Reininghaus, 7 L. D. 265; Creswell M. Co. v. Johnson, 8 L. D. 440; Peirano v. Pendola, 10 L. D. 536.

77. To stamp land as mineral in character, mineral must be actually found thereon, and a mere theory as to its existence will not be accepted as establishing its mineral character. Walton v. Batten, 14 L. D. 54.

78. Land, to be enterable under the mineral land law, must be shown to contain mineral in such quantities as will render profitable the working of the claim. It must, under the placer law, contain a valuable deposit. Royal K. Placer, 13 L. D. 86.

79. An applicant for a mineral patent must show the land claimed to contain valuable mineral, and that the improvements upon the claim tend to its development. John Downs, 7 L. D. 71.

80. The mineral character of land may be established by proof of the existence of mineral therein in paying quantities, and the actual operation of a mine on the land is not necessary to show the fact, as it may be demonstrated by experiment, prospecting and "panning." Johns v. Marsh, 15 L. D. 196.

81. In determining the character of land alleged to be chiefly valuable for coal, if coal has been *actually* produced, the probable extent of the deposit may be shown by testimony of expert geologists and miners. Rucker v. Knisley, 14 L. D. 113.

82. Land may be proven to be mineral in character without proof of the actual discovery of valuable deposits thereon, as by the fact that it is in the center of a valuable mineral belt, surrounded by valuable mines, that money is being spent preliminary to working it, and that the agricultural claimant has boasted of its mineral character. Pulliam v. Hunter, 2 C. L. O. 180.

83. The burden of proof, where land is returned as agricultural, is upon the mineral claimant, and he must show, not that the land in the neighborhood is mineral and theoretically the land in dispute must contain mineral, but that it actually does produce mineral. Dughi v. Harkins, 2 L. D. 721.

84. A mineral claimant who contests an agricultural entry, alleging the mineral character of the land, must prove that the land contains mineral of commercial value and of an extent which would justify an expenditure of money in its development. This cannot be proved by showing the production of mineral from neighboring tracts. Departmental decision of March 16, 1896, *In re* Brown v. Schmidt.

85. The mere fact that portions of the land contain particles of gold-bearing quartz would not necessarily impress it with the character of mineral land within the meaning of the statute. Alford v. Barnum, 45 Cal. 482; 10 Mor. Min. Rep. 422; Cutting v. Reininghaus, 7 L. D. 265; Etling v. Potter, 17 L. D. 424.

86. "But in determining the question of whether the land is mineral or not, such contingencies, possibilities, or even probabilities cannot be considered. * * * The statute does not reserve any land from entry as a homestead simply because some one is foolish or visionary enough to claim or work some portion of it as mineral ground, without reference to the fact whether there are any paying mines on it or not." United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 482.

87. As between mineral claimants, when it is alleged by one that the lode claim of the other was not based on a valid discovery prior to location, it is no part of the defense to show the existence of a valuable deposit of mineral. The value of the mineral deposit is a matter into which the government does not inquire after discovery and location, save in controversies between mineral and agri-

cultural claimants. Tam v. Story, 21 L. D. 449.

88. The existence of a known lode is a question of fact for the jury. "It cannot be said, as a matter of law in advance, how much gold or silver must be found in a vein before it will justify exploitation and be properly called a known vein." Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394.

89. Assays made from samples are but slight evidence of the value of the vein from which the samples are taken. Cheesman v. Shreeve, 40 Fed. Rep. 787; Dobler v. Northern Pacific R. R. Co., 17 L. D. 103.

90. The mineral claimant's duty is to show the non-agricultural character of the land as well as its value for minerals. He must also prove that it is more valuable for mining than for agricultural purposes. Caledonia M. Co. v. Rowen, 2 L. D. 714.

91. Proof of the sale of a mining claim two years after the issuance of the town site patent is not evidence of the known mineral value of the land at the date of said patent. Richards v. Dower, 81 Cal. 44; 22 Pac. Rep. 304. See S. C., 161 U. S. 658.

92. Where land was returned as agricultural and is so claimed, a mineral claimant must show it to be more valuable for mineral than for agricultural purposes. Tinkham v. McCaffrey, 18 L. D. 517.

93. When mineral has been discovered upon the land in question, the value and extent of mineral deposits on neighboring tracts are proper matters for consideration as tending to show the value of the mineral deposit discovered upon the land involved. Santa Clara M. Ass'n v. Scorsur, 4 L. D. 104; Rucker v. Knisley, 14 L. D. 113; Hamilton v. Anderson, 19 L. D. 168.

94. Proof of the mineral character of the land must be of the actual production of mineral thereon, not that adjoining lands are of that character, nor that the land in question may hereafter develop mineral. Commissioners of Kings County v. Alexander, 5 L. D. 126.

95. The mere proximity of tracts containing coal does not stamp the land on which no coal has been found as coal land. Scott v. Sheldon, 15 L. D. 361.

96. The fact that land lies in a mineral belt and that neighboring tracts contain mineral does not show the land to be mineral in character. Warren v. State of Colorado, 14 L. D. 681.

97. A coal claimant, contesting an original homestead entry, must show the land to be valuable for coal deposits by actual production of the coal. Jones v. Driver, 14 L. D. 514.

98. The proximity of land to coal veins will not warrant the conclusion that it is mineral in character, where it is not returned as such, and its mineral character is not made to appear as a present fact. John E. Williams, 11 L. D. 462.

99. In determining the value of land claimed to be valuable for coal, the fact that adjoining tracts are known to contain valuable deposits of coal may be considered in connection with the fact that coal has been discovered upon the land in question. Departmental decision of May 23, 1896, *In re* Seifred v. Minnelli.

100. "Probably in a majority of cases where a placer claim is located, other matters than the existence of valuable deposits of mineral enter into the estimate of its worth. Its accessibility to places where supplies and medical attendance can be obtained for the men engaged in working upon it, and timber secured to support the drifting or tunneling which may be necessary; the facility with which water can be brought to wash the mineral from the earth, sand or gravel, with which it may be mingled; and the uses to which the land may be subjected when the claim is exhausted, may be proper subjects of consideration." United States v. Iron Silver M. Co., 128 U. S. 673. See 24 Fed. Rep. 568.

101. In determining whether or not land is more valuable for mining than for agricultural purposes, physical difficulties to the successful working of the land as a mine may be considered. State of Washington v. McBride, 18 L. D. 199.

102. In a hearing to determine the character of land, the mineral claimant may submit testimony as to its non-agricultural character, that a comparison may be drawn between its agricultural and mineral values. Caledonia G. M. Co. v. Rowen, 2 L. D. 714.

103. *Ex parte* affidavits with no opportunity for cross-examination should not be entertained in contested mining cases. France v. Harrison, 5 C. L. O. 66.

5. *Mineral.*

104. If the land contains gold or other valuable deposits in loose earth, sand or gravel, which can be secured at a profit, it is enterable under the placer mining laws, regardless of other valuable qualities it may possess, such as timber, or the uses besides mining to which it may be put. United States v. Iron Silver M. Co., 128 U. S. 673. See 24 Fed. Rep. 568.

105. Land shown to contain mineral in sufficient quantities to justify a reasonable person in spending money and labor for its extraction is mineral in character, and as such excepted from the grant to the Northern Pacific Railroad Company. Casey v. N. P. R. R. Co., 15 L. D. 439.

106. Land which is known as a present fact to contain mineral in such quantities as will justify expenditures to obtain the same is mineral land. Departmental decision of March 27, 1896, *In re* Hull v. Livesay.

107. Land known to contain mineral in such quantity as will justify expenditure to obtain it, at date of a final homestead entry, may not be patented to the homestead claimant. Departmental decision of May 20, 1896, *In re* Porter v. Scannell.

108. "It is my opinion that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine," the land is mineral in character, and will be awarded the mineral claimant. Castle v. Womble, 19 L. D. 455.

109. Land chiefly valuable for deposits of building stone of fine quality is mineral in character, and not subject to entry under the agricultural land laws. McGlenn v. Wienbroeer, 15 L. D. 370. *Contra*, Departmental Instructions of Aug. 29, 1896.

110. Coal lands are mineral lands, and are to be acquired only under laws specifically applicable thereto. Mullan v. United States, 118 U. S. 271. (Affirming United States v. Mullan, 7 Sawy. 466; 10 Fed. Rep. 785.)

111. Land is mineral in character if it contains mineral (coal) in paying quantities, and the present remoteness of the land from lines of transportation is immaterial. Smith v. Buckley, 15 L. D. 321.

112. Land on which is found mineral of commercial value is enterable under the mineral land laws, regardless of the fact that from lack of transportation facilities the mineral cannot at the present time be put upon the market. Departmental decision of March 24, 1896, *In re* Smith v. Wallace.

113. Land valuable for deposits of mineral-bearing tailings may (apparently) be located as a mining claim. Rogers v. Cooney, 7 Nev. 213.

6. *Non-mineral.*

114. The mere presence of minerals in unascertained quantities does not make a given spot a mine. Mullan v. United States, 118 U. S. 271; Ah Yew v. Choate, 24 Cal. 562; 1 Mor. Min. Rep. 492; Alford v. Barnum, 45 Cal. 482; 10 Mor. Min. Rep. 422; Westmoreland Coal Co.'s Appeal, 85 Pa. 346; Bell v. Wilson, L. R. 1 Ch. App. 308.

115. The fact that land contains some gold will not except it from entry under the agricultural land laws if it is more valuable for agricultural than for mining purposes. United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 482.

116. It is not sufficient to constitute "known mines" of coal, within the meaning of the statute, that there should be merely indications of coal beds or coal fields of greater or less extent and value as shown by outcroppings. To constitute the exemption contemplated by the pre-emption act under the head of "known mines," there should be upon the land ascertained coal deposits of such extent and value as to make the land more valuable as a coal mine than for agricultural purposes. Colorado Coal & Iron Co. v. United States, 123 U. S. 307.

117. "It is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation." United States v. Iron S. M. Co., 128 U. S. 673. (Affirming 24 Fed. Rep. 568; approved in Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394.)

118. "The fact that there may be small quantities of gold in it not in sufficient quan-

tities to warrant miners to work it, would not prevent the homestead claimant from taking it as agricultural land." Etling v. Potter, 17 L. D. 424.

119. To be excepted from an agricultural entry, land must be known at date of entry "to be so valuable for their minerals as to justify expenditure for their extracting." Davis' Adm'r v. Weibbold, 139 U. S. 507; S. C., 7 Mont. 107.

120. Lands containing minerals, but not in "such quantities as to justify expenditures in the effort to extract them," are not mineral lands within the laws of the United States. Deffeback v. Hawke, 115 U. S. 392.

121. The fact that land contains a thick vein of coal does not stamp it as mineral in character, where it is shown that the coal cannot be profitably mined. Departmental decision of May 20, 1896, *In re* Green v. Grumbler.

122. The fact that land has been located as a mining claim is not, in itself, proof of the mineral character of the land, especially where the burden of proof is upon the mineral claimant. Etling v. Potter, 17 L. D. 424.

123. Land is not mineral if it will not pay to work by the ordinary methods of mining, as a present fact. Cuttings v. Reininghaus, 7 L. D. 265.

124. The fact that mineral (petroleum) has been discovered on adjoining tracts is not proof of the mineral character of the land. Roberts v. Jepson, 4 L. D. 60.

125. "Many springs and many waters are impregnated with mineral held in solution; but it does not follow that the lands bearing such waters are mineral lands, and can be patented as such. Lands of a saline character are an exception, and are expressly provided for in the laws relating to the disposition of the public lands. Lands containing mineral springs not of a saline character are subject to sale under the general laws, and not under the acts relating to the sale of mineral lands." Pagosa Springs, 1 L. D. 562.

126. To be reserved from sale under the agricultural land laws as mineral, lands must be capable of being profitably worked for mineral by the usual modes of mining. Departmental decision, *In re* Deadwood Town Site, 8 C. L. O. 153.

7. *Discovery.*

(See DISCOVERY, p. 36.)

127. In the matter of discovery, the spirit of the statute is satisfied by the discovery of mineral deposits of such value as to at least justify the exploration of the lode in expectation of finding ore sufficiently valuable to work. Shreve v. Copper Bell M. Co., 11 Mont. 309; 28 Pac. Rep. 315. (Davis' Adm'r v. Weibbold, 7 Mont. 107; 139 U. S. 507, distinguished.)

128. Before land may be patented under the mineral land laws "there must be a discovery of the mineral and a sufficient exploration of the ground to show this fact beyond question." United States v. Iron Silver M. Co., 128 U. S. 673. See 24 Fed. Rep. 568.

129. The value of mineral discovered in a mining claim will not be inquired into by the Land Department, except in a controversy between mineral and agricultural claimants as to the character of the land. Tam v. Story, 21 L. D. 440.

8. *Location.*

(See LOCATION, p. 77.)

130. The location of a mining claim, *prima facie* valid, raises the presumption of the mineral character of the land. Sweeney v. N. P. R. R. Co., 20 L. D. 394.

131. A certificate of location of a mining claim cannot be accepted in a contested case as establishing the mineral character of land in the absence of evidence of an actual discovery of mineral. Etling v. Potter, 17 L. D. 424.

132. The location of a mineral claim on land returned as agricultural in character will rebut the presumption raised by the return and place the burden upon an agricultural claimant of proving its non-mineral character. N. P. R. R. Co. v. Marshall, 17 L. D. 545.

133. The fact that land was once embraced in a mining location, since abandoned, is not proof of its mineral character, which must appear as a present fact. Berry v. C. P. R. R. Co., 15 L. D. 463.

134. The location of a mining claim is warranted where mineral is discovered such as would justify a person of ordinary prudence in expenditure of labor and means to

develop the claim. Castle v. Womble, 19 L. D. 455.

135. "Such matter must bear one or more of the metals named in the statute before a mine that has been discovered can be located under the law." Territory v. Mackey, 8 Mont. 168; 19 Pac. Rep. 395.

136. "Valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following in expectation of finding ore." Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362. See S. C., 111 U. S. 350.

9. *Entry.*

(See ENTRY, p. 239.)

137. A mineral entry will be canceled when it appears that the claim is not known to be valuable for mineral and is not taken for mining purposes. Trickey Placer, 7 L. D. 52.

138. Land, to be subject to entry under the placer law, must be shown to be placer mining land as a fact. Searle Placer, 11 L. D. 441.

139. A hearing to determine the mineral or non-mineral character of land should not be ordered in the absence of an application to enter it. C. P. R. R. Co., 8 L. D. 30; 9 L. D. 613.

140. The allowance of mineral entry is an adjudication of the mineral character of the land entered, and the burden of proof is thereafter upon one who alleges its non-mineral character. Johns v. Marsh, 15 L. D. 196.

141. Where a mineral entry has been allowed upon a satisfactory showing of the mineral character of the land, a hearing will not be ordered on the protest of an agricultural claimant, unless it be alleged that the land was agricultural in character at date of filing of mineral application for patent. Houghton v. McDermott, 15 L. D. 509.

142. A preference right of entry will be accorded an agricultural contestant who secures the cancellation of a mineral entry because of the non-mineral character of the land. Dornen v. Vaughn, 16 L. D. 8.

10. *Agricultural.*

(See AGRICULTURAL CLAIM, p. 376.)

143. "Thus read they must be held, we think, merely to prohibit the passage of title under the provisions of the town site laws, to mines of gold, silver, cinnabar or copper, which are known to exist, on the issue of the town site patent, and to mining claims and mining possessions, in respect to which such proceedings have been taken under the law or the custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The exceptions of mineral lands from pre-emption and settlement and from grants to States for universities and schools, for the construction of public buildings and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify the expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining States which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral' in the sense of this statute is applicable." Davis' Adm'r v. Weibbold, 139 U. S. 507. (Citing and approving Alford v. Barnum, 45 Cal. 482; 10 Mor. Min. Rep. 422; Merrill v. Dixon, 15 Nev. 401; Cowell v. Lammers, 10 Sawy. 246; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 848; United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486; Dughi v. Harkins, 2 L. D. 721; Cleghorn v. Bird, 4 L. D. 478; Samuel W. Spong, 5 L. D. 193; Commissioners of Kings County v. Alexander, 5 L. D. 126; Magalia G. M. Co. v. Ferguson, 6 L. D. 218; Nicholas Abercrombie, 6 L. D. 393; John Downs, 7 L. D. 71; Cutting v. Reininghaus, 7 L. D. 265; Creswell M. Co. v. Johnson, 8 L. D. 440; Thomas J. Laney, 9 L. D. 88.)

144. To be excepted from a final homestead entry as mineral, land must have been known at date of such entry to be mineral in character and more valuable therefor than for agricultural purposes. The discovery that land is valuable for coal, after final homestead entry, will not reserve it from patenting under the homestead entry. Nicholas Abercrombie, 6 L. D. 393.

145. To defeat a final homestead entry a mineral contestant must show that, at date of such entry, the land was known to be more

valuable for mining than for agricultural purposes. Creswell M. Co. v. Johnson, 8 L. D. 440.

146. "To constitute the exemption contemplated by the pre-emption act under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. * * * A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not 'known mines,' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed." Colorado Coal & Iron Co. v. United States, 123 U. S. 307.

147. No title from the United States to land known at the time of sale to be valuable for its minerals can be obtained under the pre-emption or homestead or the town site laws, or in any other way than as prescribed by the laws, especially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas. Deffeback v. Hawke, 115 U. S. 392; Sparks v. Pierce, 115 U. S. 408.

148. To be reserved from entry under the agricultural land laws and from patent issued under said laws, land must have been *known* at the time of sale (entry) to be valuable for its minerals. A discovery of its mineral character subsequent to that date cannot affect the title. Deffeback v. Hawke, 115 U. S. 392.

149. To be excepted from an agricultural patent land must have been known to be more valuable for mineral than for agricultural purposes at date of agricultural entry. Development after entry is immaterial. United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486; Boggs v. Merced M. Co., 14 Cal. 279; 10 Mor. Min. Rep. 334; S. C., 3 Wall. 304; Hunt v. Steese, 75 Cal. 620; 17 Pac. Rep. 920.

150. Though land, to be excepted from a pre-emption entry as mineral, must have been known to be such at date of pre-emption entry (Harnish v. Wallace, 13 L. D. 108), it need not necessarily have been known to the pre-emption entryman if its mineral character was a matter or general knowledge. Tinkham v. McCaffrey, 13 L. D. 517.

151. As the pre-emption cash entry was made June 17, 1885, and the entryman disposed of the land prior to March 1, 1888, and the protest that the tract contains gold was not filed until after March 3, 1891, the motion for a hearing is denied and the protest is dismissed. John F. Delaney, 18 C. L. O. 72.

152. A contestant against a pre-emption entry who alleges the land to have been known to be mineral at date of pre-emption entry has the burden of proving that it was more valuable for mining than for agricultural purposes. Tinkham v. McCaffrey, 13 L. D. 517.

153. To be excepted from a pre-emption entry as mineral, land must be known to be such at date of the agricultural entry. A discovery of mineral after pre-emption entry of the land would not defeat the pre-emption entry. Harnish v. Wallace, 13 L. D. 108.

154. The known character of land at the date of final homestead entry determines whether or not it should be excluded from the homestead claim because of its mineral character, the discovery of mineral subsequent to such final entry being immaterial. Rea v. Stephenson, 15 L. D. 87.

155. In view of the provisions of the act of March 3, 1891, a motion to suspend a pre-emption cash entry, in view of recent discovery of valuable minerals in the land involved, is denied. United States v. Lendrecie, 18 C. L. O. 65.

156. When mineral is discovered on land after the tract has been embraced in a homestead entry, only twenty-five feet on each side of a vein can be embraced in a mining claim, unless, for the purpose of saving the expense of a segregation survey, the homestead claimant shall allow ten acres or twenty acres to be embraced thereby. Ryan v. Buivert, 14 C. L. O. 283.

157. Land, to be excepted from an agricultural entry as mineral, must be shown to be such as a *present* fact. Scott v. Sheldon, 15 L. D. 361.

158. The discovery of the mineral character of land covered by a homestead claim, at any time prior to final entry, will defeat the same. Jones v. Driver, 14 L. D. 514.

159. A discovery of the mineral character of land embraced in an original homestead entry will defeat the entry. Dickinson v. Capen, 14 L. D. 426.

160. The character of land (whether mineral or non-mineral) embraced in a homestead claim may be questioned up to the date of final entry. A discovery of its mineral character between submission of defective final proof and date of final entry will defeat the homestead claim. Spratt v. Edwards, 15 L. D. 290.

161. The rights of an agricultural claimant will not be affected by a discovery of mineral after final agricultural entry. Arthur v. Earle, 21 L. D. 92.

162. Mineral land, to be excepted from an agricultural patent, must have been known to be such at date of the agricultural claimant's entry and payment for the land. Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348.

163. If a lode is not known at date of agricultural entry, but is subsequently discovered and located, the claimant may not follow it on its dip under the agricultural claim. Amador-Medean G. M. Co. v. South Spring Hill G. M. Co., 13 Sawy. 523; 36 Fed. Rep. 668.

164. A mineral application should not be received for land covered by a homestead entry, but, upon its tender, a hearing should be ordered to determine the character of the land. (In this case the erroneously filed application was allowed to stand pending such a hearing.) Hooper v. Ferguson, 2 L. D. 712; Cleghorn v. Bird, 4 L. D. 478.

165. A miner who enters upon land in the possession of another as agricultural must justify his entry by showing that the land is public land, that it contains minerals, and that he enters for the *bona fide* purpose of mining. Such justification must be pleaded affirmatively in the answer, with all the requisite averments to show a right under the statute or by law to enter. Lentz v. Victor, 17 Cal. 271; 12 Mor. Min. Rep. 211.

166. An agricultural settler upon mineral lands settles subject to the right of miners. Miners may extract minerals in the most practical way, and with the least injury to the occupying claimant. McClintock v. Bryden, 5 Cal. 97 (1855), 63 Am. Dec. 87; Clark v. Duval, 15 Cal. 85 (1859–60).

167. Open and notorious possession for mining is sufficient to charge an applicant for agricultural patent with notice of the mineral character of the land, and to bring such land within the description of "known mineral deposits." Gold Hill Qtz. M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

168. "When an application to enter agricultural land is made, if the locators of mining claims on the land have any objections, they must be vigilant in presenting them. The rules and regulations provide ample means for this purpose, and if the remedies are not pursued, the mineral claimants will not be heard to complain." Departmental decision of March 11, 1896, *In re* Caribou Lode.

169. Lands in Florida claimed prior to April 1, 1890, under the homestead or preemption laws, and not known to be valuable for phosphate deposits at date of such claim, may be entered under such laws notwithstanding a subsequent discovery of such deposits. (Act of Oct. 1, 1890, 26 Stat. 663.) Gary v. Todd, 18 L. D. 58.

11. *Grants.*

(See GRANT, p. 364.)

170. "The policy of Congress as expressed in its numerous grants of public lands to aid in the construction of railroads has always been to exclude the mineral lands from them, and reserve them for special disposition, as seen in the following acts among others: Acts of July 1, 1862, C. 120, 12 Stat., 489, and of July 2, 1864, C. 216, 13 Stat., 356, making grants to the Union and Central Pacific Companies; Act of July 4, 1866, C. 165, 14 Stat., 83, making a grant to the Iron Mountain Railroad Company; Act of July 13, 1866, C. 182, 14 Stat., 94, making a grant to the Placerville, etc., Railroad; Act of July 25, 1866, C. 242, 14 Stat., 239, making a grant to the California and Oregon Railroad, sections 2 and 10; Act of July 27, 1866, C. 278, 14 Stat., 292, making a grant to the Atlantic and Pacific Railroad and to the Southern Pacific Railroad; Act of March 2, 1867, C. 189, 14 Stat., 548, making a grant to the Stockton and Copperopolis Railroad; Act of March 3, 1871, C. 122, 16 Stat., 578, making

a grant to the Texas Pacific Railroad." Barden v. N. P. R. R. Co., 154 U. S. 288.

171. Where application is made for a lode claim lying partly within and partly without an odd-numbered section within the grant to the Northern Pacific Railroad Company, and the discovery is situate upon the latter portion, a hearing will be ordered to determine the question of the mineral or non-mineral character of the former portion. Departmental decision of Sept. 23, 1892, *In re* Zero Lode.

172. If land within the limits of the grant to the Northern Pacific Railroad Company (from which all minerals other than coal and iron were excepted) is discovered to be mineral in character at any time before the issuance of patent therefor to the company, it is excepted from the grant. Barden v. N. P. R. R. Co., 154 U. S. 288. (Citing and approving C. P. R. R. Co. v. Valentine, 11 L. D. 238—strong dissenting opinion.)

173. The discovery of the mineral character of land at any time prior to issuance of patent therefor under a grant excepting mineral land will exempt the land from the operation of the grant. Central Pacific R. R. Co. v. Valentine, 11 L. D. 238; North Star M. Co. v. Central Pacific R. R. Co., 12 L. D. 608; Southern Pacific R. R. Co. v. Allen G. M. Co., 13 L. D. 165; Northern Pacific R. R. Co. v. Champion Cons. M. Co., 14 L. D. 699; O'Conner v. Northern Pacific R. R. Co., 15 L. D. 247; Winscott v. Northern Pacific R. R. Co., 17 L. D. 274; Northern Pacific R. R. Co. v. Marshall, 17 L. D. 545.

174. Lands not known to be mineral in character at the date of issuance of patent therefor to a railroad company pass by the patent, even though the grant to the company excluded mineral land. Samuel W. Spong, 5 L. D. 193.

175. To be excepted from a railroad grant, land must have been known to be such at date of filing of map of general route. Francoeur v. Newhouse, 40 Fed. Rep. 618; 43 Fed. Rep. 238; Valentine v. Valentine, 47 Fed. Rep. 597. *Contra*, Central Pacific R. R. Co. v. Valentine, 11 L. D. 238; Barden v. Northern Pacific R. R. Co., 154 U. S. 288.

176. The act of February 26, 1895, providing for the classification of lands within the grant to the Northern Pacific Railroad Company (in the States of Idaho and Montana) with respect to their mineral or non-mineral character does not suspend the authority of the Land Department to pass upon pending cases involving that question, nor does it withdraw such lands from appropriation and entry. Sweeney v. Northern Pacific R. R. Co., 21 L. D. 65.

177. A State admitted before the survey of lands is entitled to sections 16 and 36 under its school grants, if they were not known to be mineral at date of the approval of the survey, and a discovery of mineral thereon subsequently will not defeat the right of the State. (The State acquires no rights, however, by an irregular survey which is approved and thereafter suspended.) Virginia Lode, 7 L. D. 459; J. Dartt, 5 C. L. O. 178; Town of Silver Cliff v. State of Colorado, 6 C. L. O. 152; State of Colorado, 6 L. D. 412; State of Colorado, 7 L. D. 490.

178. The right of a State under a school grant attaches, as to non-mineral lands previously surveyed, at date of the admission of the State. As to non-mineral lands surveyed subsequent to the admission of the State, the right attaches at date of approval of the survey. Warren v. State of Colorado, 14 L. D. 681.

179. Land returned by the United States Surveyor General as mineral does not pass to a State under a school land grant. Giovanni Le Franchi, 8 L. D. 229.

180. The mineral or non-mineral character of land in a school section (surveyed before the admission of the State), as known at the date of the admission of the State, determines whether or not it passed to the State under its grant. Boulder and Buffalo M. Co., 7 L. D. 54.

181. If land is known to be valuable for mineral at date of the admission of a State, it cannot pass to the State under its school grant. State of Washington v. McBride, 18 L. D. 199.

182. A grant of land for school purposes to the State does not pass known mineral lands, even though mineral lands were not expressly excepted from the grant. Keystone Lode & Mill Site v. Nevada, 15 L. D. 259.

183. Where a grant of land is made to a State after its admission, the mineral or non-mineral character at date of the subsequent survey thereof determines whether or not it passed to the State under the grant. Pereira v. Jacks, 15 L. D. 273.

184. To be excepted from a grant of school lands to a State, land must have been known to be valuable for mineral, as a fact, at the date of the approval of the survey thereof, when the State was admitted prior to such survey. Frees v. State of Colorado, 22 L. D. 510.

185. One who applies for patent for a lode claim situate in a school section may be allowed to show that the land was known to be mineral in character at the date of the admission of the State, and hence excepted from the grant to the State. Fleetwood Lode, 12 L. D. 604.

186. If lands claimed by a State under the grant excepting mineral lands are discovered to be mineral before certification to the State, they do not pass under the grant. State of California, 7 L. D. 490. (Contrary to other Departmental decisions, and expressly overruled in case of Abraham L. Miner v. State of California, 9 L. D. 408.)

187. Under a grant of school lands, "The State's title vests, if at all, at the date of the completion of the survey. Cooper v. Roberts, 18 How. 173; Virginia Lode, 7 L. D. 459. And, if the land, although in reality mineral, was not then *known* to be mineral, the subsequent discovery of its mineral character would not divest the title which had already passed." Abraham L. Miner v. State of California, 9 L. D. 408.

188. Land returned as mineral in character is not subject to selection by a State as school indemnity land until the return has been overcome by testimony submitted after publication of notice, under paragraph 110 of the Mining Circular, as amended July 2, 1894. (19 L. D. 21.) State of California v. United States, 22 L. D. 402.

12. *Patent.*

(See PATENT, p. 259.)

189. If patent is secured under the placer mining laws for land not containing any placer deposits, for the purpose of securing title to the timber thereon, the United States may maintain a suit to vacate such patent for fraud in its procurement. United States v. Iron Silver M. Co., 128 U. S. 673. See 24 Fed. Rep. 568.

190. When a patent issues under a law which provides for the disposal of land as agricultural, and there is no reservation in the law except a general one of mineral, and none in the patent, the patent is a conclusive adjudication by the government that the land is agricultural, and a court may not thereafter reopen collaterally the question as to the character of the land. Gale v. Best, 78 Cal. 235.

191. To warrant the vacation of a patent issued for mineral land under the agricultural land laws, the misrepresentation as to the character of the land must have been falsely and fraudulently made. A mistake as to the character of the land will not cause the vacation of the patent on the ground of fraud. United States v. Iron Silver M. Co., 24 Fed. Rep. 568. See 128 U. S. 673.

192. A patent issued under the agricultural laws for land known to be mineral will be vacated upon suit by the United States. United States v. Culver, 52 Fed. Rep. 81.

193. A mineral patent renders *res adjudicata*, so far as the Land Department is concerned, the fact that the land was known to be mineral. Blackmore v. Reilly, 17 Pac. Rep. 72.

194. A patent to a railroad company is not conclusive evidence that the land is non-mineral in character. The party claiming under subsequent mining patent may show that the land is mineral, and, upon such showing being made, his title will be declared quieted. Chicago Quartz Mine v. Oliver, 75 Cal. 194.

195. After patent has issued for a town site, a miner may not locate a claim inside the patented limits and then attack the validity of the town site patent on the ground that the land located was known to be mineral at date of the town site entry. The patent must be attacked directly if at all. Carter v. Thompson, 65 Fed. Rep. 329.

196. A patent to a railway company will be set aside if the ground was known at time of patenting to be mineral in character. McLaughlin v. United States, 107 U. S. 526; West. Pacific R. R. Co. v. United States, 108 U. S. 510.

197. If land known to be valuable for mineral is patented to a railroad company under a grant excepting mineral lands, the United States has such an interest in the matter as would warrant the Secretary of the Interior in recommending suit to vacate

the patent. Bullock v. Central Pacific R. R. Co., 11 L. D. 590.

198. When the complaint in an action to annul a patent alleged in substance that no discovery had been made, and the evidence is conflicting, proof that the claim was considered valuable for mining purposes was held sufficient, and the patentees were not obliged to show that there was a reasonable probability of the claim becoming a source of profit to constitute a mine within the meaning of the statute. United States v. King, 9 Mont. 75; 22 Pac. Rep. 498.

199. Where, by the terms of a patent, mineral lands are excluded from the grant, it is competent for the party claiming adversely to the patentee to show that the land in dispute is mineral in character, and therefore excepted from the operation of the patent. McLaughlin v. Powell, 50 Cal. 64; 10 Mor. Min. Rep. 424.

200. A person claiming under a mineral location, to be entitled to the possession as against one claiming under a patent to a railroad company, must show that at date of such patent the land was *known* to be more valuable for mining than for agricultural purposes; and, in determining the relative value for such purposes, subsequent changes cannot be considered. Hunt v. Steese, 75 Cal. 620; 17 Pac. Rep. 920.

13. *Segregation.*

(See SURVEY, p. 187.)

201. A survey to segregate a mining claim from agricultural land may be made at the expense of an agricultural claimant desirous of entering the land. Walter Bond, 18 L. D. 418.

202. After a hearing has been held to determine the character of land embraced within a homestead entry, it is the province, not of the local officers, but of the Commissioner of the General Land Office, to issue instructions in regard to a segregation survey of a mineral claim therein. Ryan v. Buivert, 14 C. L. O. 283.

203. Where, upon a contest, it is decided that the land in conflict between an agricultural entry and an unsurveyed mining claim is mineral in character, a segregation survey must be made at the expense of the mineral claimant. Creswell M. Co. v. Johnson, 8 L. D. 440.

204. Where an agricultural entry is shown to embrace a valid mining claim, the agricultural claimant must have a survey made at his expense, under the direction of the United States Surveyor General, segregating the mineral from the agricultural land. Darragh v. Holdman, 11 L. D. 409.

205. Where it is alleged that land covered by an agricultural claim contains coal, the inquiry should be whether any forty-acre subdivision taken as an entirety is more valuable for coal than for agricultural purposes. A part of such subdivision may not be segregated as valuable for coal. Mitchell v. Brown, 3 L. D. 65.

206. No paying mines having been developed on the land prior to the homestead entry of Johnson, and the same having been returned as non-mineral by the United States Deputy Surveyor, the burden of proof is on the mineral protestants, who have failed in this case to overcome the return of the surveyor so far as to show that the land is more valuable for mineral than for agriculture; but inasmuch as the surrounding lands in the township are shown to be mineral in character, notwithstanding said return, the existing mineral claims may be segregated within the time limited, but at the expense of protestants instead of the homesteader, and the decision of the General Land Office is modified accordingly. Creswell M. Co. v. Johnson (review), 8 L. D. 440–443.

207. The failure of the public land surveyors to segregate mineral lands will not work injury to mine owners. Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

14. *Town Site.*

(See TOWN SITE, p. 451.)

208. A town site entry may embrace mineral land, the rights of miners being protected by section 2386, United States Revised Statutes. Rico Town Site, 1 L. D. 556.

209. Town sites may be located on mineral lands, the rights of mining claimants being protected by statutory reservations thereof inserted in a town site patent. (Secs. 2386 and 2392, U. S. Rev. Stat.) Relative rights of mining claimants and of town site claimants are to be decided by the courts. Esler v. Town Site of Cooke, 4 L. D. 212.

210. Section 16 of the act of March 3, 1891 (26 Stat. 1095), relative to allowance of town

site entries on mineral lands, is not retroactive. Protector Lode, 12 L. D. 662; Pacific Slope Lode, 12 L. D. 686.

211. A town site entry and patent are "inoperative as to all lands known at the time to be valuable for their mineral, or discovered to be such before their occupation or improvement for residence or business under the town site title." Deffeback v. Hawke, 115 U. S. 392; Sparks v. Pierce, 115 U. S. 408; W. A. Simmons, 7 L. D. 283.

212. To be excepted from a town site patent, land must have been known to be mineral at date of town site patent (entry), and the fact that it is thereafter discovered to be valuable for mineral prior to its use or occupancy for town site purposes is immaterial. McCormick v. Sutton, 97 Cal. 373.

213. Land not known to be mineral at date of town site entry passes by the town site patent. Tombstone Town Site Cases, 15 Pac. Rep. 26.

214. To be excepted from town site patent, land must have been known to be more valuable for mineral than for agricultural purposes at date of town site patent (entry), or before occupation for town site purposes (if the town site is not entered). Richards v. Dower, 81 Cal. 44; 22 Pac. Rep. 304. See S. C., 151 U. S. 658.

215. The occupation of land for town site purposes cannot withdraw it from location and entry under the mineral land laws, if it is valuable for minerals contained. Deffeback v. Hawke, 115 U. S. 392; Sparks v. Pierce, 115 U. S. 408.

216. The present or prospective value of mineral lands for town site purposes will not prevent acquisition of title thereto under the mineral land laws. Deadwood Town Site, 8 C. L. O. 18; State of Washington v. McBride, 18 L. D. 199.

217. Land covered by a town site patent may not be entered under the mineral land laws because discovered, after the town site entry, to be valuable for mineral. Thomas J. Laney, 9 L. D. 83.

218. A town site entry may be allowed to embrace non-contiguous tracts where the original town site application was for contiguous lands and the subsequent non-contiguity is caused by the exclusion of land decided, on hearing had, to be mineral in character and covered by a mining claim. McChrystal v. Eureka Town Site, 21 L. D. 478.

15. *Mill Site.*

(See MILL SITE, p. 355.)

219. The non-mineral character of land claimed as a mill site must be affirmatively shown under oath. Alta Mill Site, 8 L. D. 195.

220. An applicant for a lode patent, by excluding conflict with a mill site, admits the non-mineral character of the land embraced therein, and if the assumed course of the lode is intersected by said mill site, the lode claimant may retain in his application only one of the non-contiguous parts of his claim. Michael Howard, 15 L. D. 504.

221. If the presumed line of the lode is interrupted by a tract excluded as non-mineral, the lode claimant may not embrace the non-contiguous portions of his lode in one mineral entry. Andromeda Lode, 13 L. D. 146; Bimetallic M. Co., 15 L. D. 309.

16. *General.*

222. Where the evidence submitted by an applicant for a placer patent shows the land applied for to be placer mining land, the character of the land cannot be questioned by one asserting an adverse claim who has not proceeded as directed by section 2326, United States Revised Statutes. Dahl v. Raunheim, 132 U. S. 260. See 6 Mont. 167; 9 Pac. Rep. 892.

223. The non-mineral character of a mining claim may be raised only by the government, or by one claiming the ground under some other than the mineral land law. Lorenz v. Waldron, 96 Cal. 243.

224. A defeated adverse claimant is estopped from alleging that the land in dispute is non-mineral in character. Evans v. Rendall, 3 C. L. O. 2.

225. Where the character of land embraced in a coal entry is in question, the character of each legal subdivision (of forty acres or fractional part thereof) should be determined. Scott v. Sheldon, 15 L. D. 588. (On review.)

226. The mineral character of land alleged to be more valuable for the coal it contains

must be established as a present fact, and from the actual production of coal; but it does not follow that there must be an actual development of coal on each forty-acre subdivision. Hamilton v. Anderson, 19 L. D. 168.

227. "It seems clear that this proviso (to sec. 2348, U. S. Rev. Stat.) means that where an association has expended $5,000 or more in working and improving a coal mine or mines, then, in consideration of such expenditure, the association may enter by legal subdivisions not to exceed six hundred and forty acres of land, including the legal subdivisions of the land on which the mining improvements are actually situated, irrespective of whether the land covered by the improvements is coal land or agricultural land." McWilliams v. Green River Coal Ass'n, 23 L. D. 127. (Citing Rucker v. Knisley, 14 L. D. 113; Hamilton v. Anderson, 19 L. D. 168.)

228. A non-mineral affidavit is not required of agricultural claimants in Alabama. Robert Lally, 10 C. L. O. 55.

229. A non-mineral affidavit is not required of public land claimants in Kansas and Missouri. Circular of July 21, 1876, 3 C. L. O. 132.

230. An agricultural protestant against a mineral entry must show the land to have been non-mineral in character at date of the mineral application. Houghton v. McDermott, 15 L. D. 509.

231. A mineral application will not be allowed if the mineral character of the land does not satisfactorily appear. Morrill v. Margaret M. Co., 11 L. D. 563.

232. A timber culture claimant in a State or Territory where the mineral laws are not operative would not jeopardize his claim by disposing of stone quarried therefrom. J. P. Lindsay, 12 C. L. O. 39.

233. Excepting clauses are inserted in agricultural and placer patents. Com'r to H. F. Page, 2 C. L. O. 82.

234. Alabama land returned as valuable for coal prior to the act of March 3, 1883 (22 Stat. 487), is not subject to homestead entry until offered at public sale. Alice Jordan, 7 L. D. 461; Nathaniel Banks, 7 L. D. 512; 8 L. D. 532; J. C. Henley, 9 L. D. 178.

235. The fact that land contains gold in small quantities does not necessarily make it mineral land. Ah Yew v. Choate, 24 Cal. 562; 1 Mor. Min. Rep. 492.

CROSS-VEINS.

I. The Statute.
II. Decisions.

I. The Statute.

Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection. 17 Stat. 96; sec. 2336, U. S. Rev. Stat. See also sec. 2322, U. S. Rev. Stat., p. 55.

II. Decisions.

1. Lode claims may be located across each other. Cheesman v. Hart, 42 Fed. Rep. 98.

2. "Under Sections 2322 and 2336, U. S. Rev. Stat., when a junior mining location crosses a senior location, and the veins therein are cross-veins, the junior locator is entitled to all the ore found in his vein within the side lines of the senior location except at the space of intersection. In such a case a junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross veins." Branagan v. Dulaney, 8 Colo. 408; 8 Pac. Rep. 669; Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77. (Affirmed, 13 Colo. 174; 22 Pac. Rep. 436.)

3. Where two lodes cross on the strike, the senior locator has the right to the ore at the point of intersection, but otherwise the junior locator has all of his lode, including right of way through intersection. Pardee v. Murray, 4 Mont. 234; 2 Pac. Rep. 16; 15 Mor. Min. Rep. 515.

4. The owner of a lode claim owns all lodes the apexes of which are within his side lines. A subsequent locator who locates across the first claim has no right to take ore from the first locator. Watervale M. Co. v. Leach, 33 Pac. Rep. 418 (Arizona); Wilhelm v. Sylvester, 101 Cal. 358; 35 Pac. Rep. 997. *Contra*, Branagan v. Dulaney, 8 Colo. 408; 8 Pac. Rep. 669; Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77; 13 Colo. 174; 22 Pac. Rep. 436; Morgenson v. Middlesex M. & M. Co., 11 Colo. 176; 17 Pac. Rep. 513; Oscamp v. Crystal River M. Co., 19 U. S. App. 18.

5. Where lodes in their *general* directions are cross-lodes, one may be patented exclusive

of the other, although in a part of the conflict of claims they may be parallel. Patten Extension Lode, 15 L. D. 133.

6. In case of failure to adverse, only cross-veins and those uniting on the dip with the one patented, are excepted from the patent. Lee v. Stahl, 13 Colo. 174; 22 Pac. Rep. 436. (Affirming 9 Colo. 208; 11 Pac. Rep. 77.) Morgenson v. Middlesex M. & M. Co., 11 Colo. 176; 17 Pac. Rep. 513.

7. Where two or more veins intersect or cross each other, priority of title shall govern. Sacramento M. Co. v. Last Chance M. Co., 3 C. L. O. 66.

8. A prior locator need not adverse to secure his rights to his vein at the point of intersection; but by failure to adverse he loses surface rights. When two veins join on the strike there must be surface conflict. Hence, the rules as to surface conflicts apply as to conflicts between lodes. Lee v. Stahl, 13 Colo. 174; 22 Pac. Rep. 436. (Affirming 9 Colo. 208; 11 Pac. Rep. 77.) Morgenson v. Middlesex M. & M. Co., 11 Colo. 176; 17 Pac. Rep. 513.

9. By failure to adverse the application of a junior locator of a cross-lode, the senior locator loses his lode at point of intersection of the two veins, but not his right to the remainder of his lode within the conflict between the two claims. Branagan v. Dulaney, 8 Colo. 408; 8 Pac. Rep. 669; Lee v. Stahl, 9 Colo. 208; 11 Pac. Rep. 77. (Affirmed, 13 Colo. 174; 22 Pac. Rep. 436.) Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 1 Mor. Min. Rep. 178. *Contra*, Watervale M. Co. v. Leach, 33 Pac. Rep. 418 (Arizona); Wilhelm v. Sylvester, 101 Cal. 358; 35 Pac. Rep. 997.

10. Section 2336 was not intended to limit or define the rights of a person in mere possession of a tract of mining ground where there is more than one vein, or to prescribe the effect of a conveyance by the locator of a claim of a portion of his location containing one of such veins. The objects of the statute were to supplement the provision of section 2322, and to prescribe rules under which *different* locations by *different* proprietors should be held, and to determine the rights of such proprietors in case of intersecting veins. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98; S. C., 96 Cal. 33; 30 Pac. Rep. 839.

11. Where section 2336 does not apply by reason of a conveyance by the locator to his grantee of a portion of the claim, the ordinary rule governing grants must of necessity apply, and if the intersection of the vein takes place on the part of the claim conveyed, the grantee takes all the mineral at the place of intersection. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98; S. C., 96 Cal. 33; 30 Pac. Rep. 839.

12. Where the dividing line between the original location of the mining claims has been disregarded by one who has become the owner of both of them, and he has sold and conveyed a portion thereof not purporting to be made in accordance with the lines of the original locations, but as a conveyance of a tract of mining ground, carved out of the entire tract by metes and bounds, the grantor is estopped by his deed from questioning the right of his grantee to all the gold found within the surface lines of the deed, irrespective of the depth below the surface at which it is found, and such grantee has title to the gold found at the place of intersection of two veins falling within the surface lines of the deeded tract. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98; S. C., 96 Cal. 33; 30 Pac. Rep. 839.

MILL SITE.

I. The Statute.
II. Regulations.
III. Decisions.
1. *General.*
2. *Under First Clause.*
3. *Under Second Clause.*

I. The Statute.

Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section. 17 Stat. 96; 19 Stat. 52; sec. 2337, U. S. Rev. Stat.

II. Regulations.

64. Section 2337 provides that "where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section."

65. To avail themselves of this provision of law, parties holding the possessory right to a vein or lode, and to a piece of nonmineral land not contiguous thereto, for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, United States Revised Statutes, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land-office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field-notes, may include, embrace, and describe, in addition to the vein or lode, such noncontiguous mill-site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim.

66. In making the survey in a case of this kind, the lode claim should be described in the plat and field-notes as "Sur. No. 37, A," and the mill-site as "Sur. No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the mill-site to a corner of the lode claim to be invariably given in such plat and field-notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill-site as well as upon the vein or lode for the statutory period of sixty days. In making the entry no separate receipt or certificate need be issued for the mill-site, but the whole area of both lode and mill-site will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and mill-site claim.

67. In case the owner of a quartz-mill or reduction-works is not the owner or claimant of a vein or lode, the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill-site at said price per acre.

68. In every case there must be satisfactory proof that the land claimed as a mill-site is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of two or more persons capable from acquaintance with the land to testify understandingly.

III. Decisions.

1. *General.*

1. A mill site is a mining claim or possession under section 2392, United States Revised Statutes, and is excepted from a town site patent if located prior to town site entry. Hartman v. Smith, 7 Mont. 19; 14 Pac. Rep. 648.

2. A mill site may be located under the mineral land laws, and if so located it should be recorded. E. T. George, 2 C. L. O. 114.

3. The right to hold a mill site under section 2337, United States Revised Statutes, must be initiated by the location of the same as a mining claim. Rico Town Site, 1 L. D. 556; Hargrove v. Robertson, 15 L. D. 499.

4. A duly qualified corporation may locate a mill site under the provisions of section 2337, United States Revised Statutes, and maintain an adverse claim in defense of its claim. Bay State Gold M. Co. v. Trevillion, 10 L. D. 194.

5. A mill site owner must protect his claim by an adverse when it is embraced in another's application for mineral patent. Warren Mill Site v. Copper Prince Lode, 1 L. D. 555.

6. A mill site claimant may adverse an application for a mineral patent. Shafer v. Constans, 3 Mont. 369; 1 Mor. Min. Rep. 147.

7. Where a mine owner claims a spring and uses the water, conducted through a ditch, at a distant smelter, such claim is not a mill site, but a water right, which cannot be patented under the mining laws. Charles Lennig, 13 C. L. O. 110. See S. C., 5 L. D. 190.

8. The fact that land is covered by a water right, held under local laws, will not bar entry thereof as a mill site. Charles Lennig, 5 L. D. 190.

9. The fact that land has upon it "a dam on Middle Percha creek with a cribbing on each side to keep embankment in place; a water-box with screen; a pipe line extended thence to smelter reservoir," etc., will not entitle the claimant to enter the same as a mill site, the use of water taken from the land not

being a use of the land. Iron King Mine and Mill Site, 9 L. D. 201.

10. A patent cannot issue for a mill site used merely for a water-power. Com'r to J. P. Sayer, March 19, 1892.

11. Land not improved or occupied for mining or milling purposes may not be appropriated as a mill site for the purpose of securing the water thereon. Mint Lode & Mill Site, 12 L. D. 624.

12. The building of a tram road, or the grading of the road-bed therefor, is no such a use or improvement of the land as warrants the allowance of application therefor as a mill site. An application for a mill site cannot be allowed where it appears that the improvements are located on the line between two mill sites without either location possessing the requisite improvements independently of the other. Hecla Cons. M. Co., 14 L. D. 11.

13. A mill site may not be taken as appurtenant to another mill site. Hecla Cons. M. Co., 12 L. D. 75.

14. Mill sites abutting the ends of lode claims are not subject to entry. James M. Freeman, 7 C. L. O. 4.

15. A mill site abutting the end of a lode claim may be shown to be non-mineral. National M. & Exploring Co., 7 C. L. O. 179.

16. The non-mineral character of land claimed as a mill site must be affirmatively shown under oath. Alta Mill Site, 8 L. D. 195; Gold Springs & Denver City Mill Site, 13 L. D. 175; Patterson Quartz Mine, 4 C. L. O. 3.

17. Where a mill site is located upon land claimed by a pre-emptor, the relative rights of the parties are to be determined by priority of possession. Sierra Grande M. Co. v. Crawford, 11 L. D. 338.

18. Where a mill site, for which application for patent is made, is alleged to be non-mineral in character, though embraced in an application for patent for a placer claim, a hearing may be ordered to determine the facts in the matter. Theodore H. Becker, 5 C. L. O. 51.

19. A miner who has occupied a tract with valuable improvements as a mill site, may enter the same with Porterfield scrip. The objection that the tract is not unappropriated land has no force where the entryman alone has valuable improvements on the land. Such a tract covered by mills and reduction works is not subject to entry by an agricultural claimant. Stephen B. Moore, 11 C. L. O. 326.

20. The location of a mill site upon public land does not operate as an appropriation thereof so as to reserve it from town site location. Rico Town Site, 1 L. D. 556.

21. An applicant for a lode patent, by excluding conflict with a mill site, admits the non-mineral character of the land embraced therein, and if the assumed course of the lode is intersected by such mill site, the lode claimant may retain in his application only one of the non-contiguous parts of his claim. Michael Howard, 15 L. D. 504.

22. Patent will not issue for a lode claim divided into two non-contiguous parts by a patented mill site, but may be issued for the tract on which are situate the discovery and improvements. Andromeda Lode, 13 L. D. 146.

23. If a mill site, legally held, is timbered, the locator may cut the timber for the purpose of constructing a mill, reduction works, tramways, or other accessory required in the development of his mineral interests, but not for sale or for the use of other persons. A. B. Page, 1 L. D. 614.

24. Milling parties cannot sell timber cut from mineral lands to lumber dealers. Such timber must be sold to individuals for personal use. Arthur Grabowskie, 14 C. L. O. 252.

25. The use of wood in quartz mills or reduction works is a use for mining purposes within the meaning of the act of June 3, 1878 (20 Stat. 89), allowing timber cutting. Frank P. Hardin, 1 L. D. 597.

26. The allowance of a mineral entry for a mill site under the first clause of section 2337, United States Revised Statutes, without proof of the use and occupancy of the land for mining or milling purposes, is erroneous, and upon cancellation of the entry as to the mill site the purchase-money should be repaid. Hudson M. Co., 14 L. D. 544.

27. A mill site may be applied for with each of several lodes embraced in one application. Com'r to L. U. Colbath, Jan. 12, 1893.

2. *Under First Clause of Section 2337, United States Revised Statutes.*

28. Any number of tracts not exceeding five acres in the aggregate, used and occupied for mining and milling purposes, may be taken appurtenant to a lode claim, under the first clause of section 2337, United States Revised Statutes. J. B. Haggin, 2 L. D. 755.

29. To be enterable under the first clause of section 2337, United States Revised Statutes, a mill site must be: (1) Non-mineral; (2) Non-contiguous to the lode; and (3) Used or occupied by the owner of the lode for mining or milling purposes. Gold Springs & Denver City Mill Site, 13 L. D. 175.

30. At date of application for patent for a mill site there must be shown actual use or occupation thereof for the purpose of mining or milling. Mere intention or purpose on a certain contingency of performing acts of use or occupation thereon will not satisfy the law. Ontario S. M. Co., 13 C. L. O. 159.

31. Mere use of a tract as an appurtenant to an adjacent mining claim gives the possessor no right to the land. (If non-mineral land it should be located as a mill site.) Waterloo M. Co. v. Doe, 56 Fed. Rep. 685.

32. To be enterable under the first clause of section 2337, United States Revised Statutes, a mill site must be actually used, as a present fact, for mining or milling purposes, in direct connection with the lode claim to which it is claimed to be appurtenant, and with which it is applied for. Peru Lode and Mill Site, 10 L. D. 196.

33. A mineral application for a mill site on which there is no mill, and which is not used or occupied in connection with a lode which has been applied for, is invalid. Hamburg M. Co. v. Stephenson, 17 Nev. 449; 30 Pac. Rep. 1088.

34. An entry of a mill site as appurtenant to a lode claim will be canceled on its being shown that the mill site is not so used, but is entered for the benefit of another to be used for other than mining purposes. Syndicate Mill Site, 11 L. D. 561.

35. Use of land as a site for pumping works for supplying water to a mining claim is such a use as will allow entry of the land as an adjunct to a lode claim, under the first clause of section 2337, United States Revised Statutes. Sierra Grande M. Co. v. Crawford, 11 L. D. 388.

36. Use of a mill site for storage of water necessary to the operation of the mine is a sufficient use and occupancy for mining purposes. Gold Springs & Denver City Mill Site, 13 L. D. 175.

37. The mere use of water from springs on the land in connection with the working of a lode claim is not such a use and occupancy of the land as will render it subject to entry as a mill site. Charles Lennig, 5 L. D. 190; Cyprus Mill Site, 6 L. D. 706; Iron King Mine and Mill Site, 9 L. D. 201; Mint Lode and Mill Site, 12 L. D. 624.

38. An ore-house and a tool-house on a mill site is good use and occupancy. Hartman v. Smith, 7 Mont. 19; 14 Pac. Rep. 648.

39. The use, in a mine, of timber growing upon land is not such a use of the land as will warrant entry thereof as a mill site appurtenant to the mine, under the first clause of section 2337, United States Revised Statutes. Two Sisters Lode and Mill Site, 7 L. D. 557.

40. Land is used for mining or milling purposes when the claimant has a quartz mill, reduction works, shops, houses for his workmen thereon, or when it is used for depositing tailings or storing ores. Charles Lennig, 5 L. D. 190.

41. The erection and use on a mill site of dwelling-houses for the use of miners working on the lode claim, applied for in connection therewith, is such a use and occupancy as will justify entry of the land, under the first clause of section 2337, United States Revised Statutes. Satisfaction Extension Mill Site, 14 L. D. 178.

42. A tract on which are situate a house used as an office and residence of the superintendent of the mine, a stable, a railroad sidetrack and a store-house, all used in connection with a patented lode claim, is so used and occupied as to be enterable as a mill site under the first clause of section 2337, United States Revised Statutes. Eclipse Mill Site, 22 L. D. 496.

43. Where a lode claim and a mill site appurtenant thereto are embraced in one survey and in one application for patent, the survey of the mill site need not be connected with a corner of the public surveys or a United States mineral monument, if con-

nected with the survey of the lode claim, and in such a case it is not incumbent upon the claimant to show an expenditure of $500 upon the mill site, its use or occupancy for mining or milling purposes in connection with the lode claim being sufficient to entitle claimant to ask for a patent therefor. Alta Mill Site, 8 L. D. 195.

44. A tract of land claimed and used for mining and milling purposes in connection with a patented lode claim may be entered under the first clause of section 2337, United States Revised Statutes, viz., the mill site need not be applied for and entered with the lode claim. Eclipse Mill Site, 22 L. D. 496; Departmental decision of May 23, 1896, *In re* Idaho Mill Site; Com'r to Prescott Office, Sept. 12, 1895, *In re* Genung Spring and Mill Site. *Contra*, Com'r to Prescott Office, May 6, 1893.

45. Notice of application for patent should be posted on both a lode and a mill site covered by the same application, but failure to post on the mill site may be waived where such failure was caused by inadvertence and extensive improvements have been placed thereon. Bailey and Grand View M. & Sm. Co., 3 L. D. 386.

46. An entry of a lode and mill site defective in that notice of application for patent was not posted upon the mill site may be referred to the Board of Equitable Adjudication. New York Lode and Mill Site, 5 L. D. 513. (Overruling Bailey and Grand View M. & Sm. Co., 3 L. D. 386.)

47. An applicant for patent to a mill site under the first clause of section 2337, United States Revised Statutes, must show title to the lode claim in connection with which it is claimed. Com'r to Hailey Office, July 3, 1896, *In re* Grouse Creek No. 2 Mill Site.

48. A mill site may be located prior to application for patent for the lode claim in connection with which it is to be used. Hargrove v. Robertson, 15 L. D. 499.

3. *Under Second Clause of Section 2337, United States Revised Statutes.*

49. The right to make entry of a mill site under the second clause of section 2337, United States Revised Statutes, depends upon the existence thereon of a quartz mill or reduction works. Charles Lennig, 5 L. D. 190; Cyprus Mill Site, 6 L. D. 706; Two Sisters Lode and Mill Site, 7 L. D. 557; Le Neve Mill Site, 9 L. D. 460; Hecla Cons. M. Co., 12 L. D. 75.

50. The right to make entry of a mill site under section 2337 (second clause), United States Revised Statutes, depends upon the existence on the land of a quartz mill or reduction works. There is no provision of law by which a mill site can be acquired as additional to, or in connection with, an existing mill site. Hecla Cons. M. Co., 12 L. D. 75.

51. A mill site taken under the second clause of section 2337, United States Revised Statutes, must have on it a mill or reduction works. A part interest in a mill upon another mill site cannot be considered as entitling the claimant to a patent. Com'r to Hailey Office, July 3, 1896, *In re* Grouse Creek No. 2 Mill Site.

52. A mineral application will not be received for a mill site under the second clause of section 2337, United States Revised Statutes, unless it appears that there is situate upon the tract applied for a quartz mill or reduction works capable of being used independently of works on an adjoining mill site; i. e., two mill sites may not be applied for by placing one mill or reduction works upon the line between them. Hecla Cons. M. Co., 14 L. D. 11.

53. Annual expenditures of $100 are required upon mill site claims held under the second clause of section 2337, United States Revised Statutes, as well as upon mining claims. Com'r to Surveyor General, San Francisco, Cal., Feb. 9, 1892; Com'r to C. M. Foster, May 7, 1892.

54. A mill site taken under the second clause of section 2337, United States Revised Statutes, should be connected, in the survey thereof, with a United States mineral monument, or a corner of the public surveys, and if not so connected an amended survey will be ordered. Senator Mill Site, 7 L. D. 475.

55. Under the last clause of section 2337, United States Revised Statutes, an applicant for patent for a mill site claim must furnish the certificate of the United States Surveyor General showing that $500 have been expended upon the claim. Com'r to Surveyor General, San Francisco, Cal., Dec. 14, 1891; Com'r to Surveyor General, San Francisco, Cal., Jan. 8, 1892.

56. Where a lode claim and mill site are located, and later the land covered thereby is entered under the homestead law and proved to be non-mineral, the mineral claimant who had erected a mill on the mill site has the better right thereto, though he must thereafter hold it under the second clause of section 2337, United States Revised Statutes. Adams v. Simmons, 16 L. D. 181.

EASEMENTS — DRAINAGE.

I. The Statute.

(See Water Rights.)

As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent. 14 Stat. 252; 19 Stat. 52; sec. 2338, U. S. Rev. Stat.

WATER RIGHTS.

I. The Statutes.
II. Decisions.

I. The Statutes.

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. 14 Stat. 253; sec. 2339, U. S. Rev. Stat.

All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section. 16 Stat. 218; sec. 2340, U. S. Rev. Stat.

II. Decisions.

1. The common-law doctrine, that prior appropriation of water of a stream by a riparian proprietor confers no exclusive right to the use of it as against another riparian proprietor unless the latter's rights are impaired by grant or license, or the prior appropriation has continued adversely for more than twenty years, has been modified by local usage and statutory enactment (Palmer v. Mulligan, 3 Caines, 307; Platt v. Johnson, 15 Johns. 213; Martin v. Bigelow, 2 Aikens, 184; S. C., 16 Am. Dec. 696; Hoy v. Sterrett, 2 Watts, 327; S. C., 27 Am. Dec. 313; Stout v. McAdams, 2 Scam. 67; S. C., 33 Am. Dec. 441; Davis v. Fuller, 12 Vt. 178; S. C., 36 Am. Dec. 334; Evans v. Merriweather, 3 Scam. 492; S. C., 38 Am. Dec. 107; Hartzall v. Sill, 12 Pa. St. 248; Bliss v. Kennedy, 43 Ill. 67; Rudd v. Williams, 43 Ill. 385; Gilman v. Tilton, 5 N. H. 231; Cowles v. Kidder, 24 N. H. 378; Stillman v. W. R. etc. Co., 3 Wood. & M. 550; Parker v. Hotchkiss, 25 Conn. 321; Keeney. etc. Mfg. Co. v. Union Mfg. Co., 39 Conn. 576; Tyler v. Wilkinson, 4 Mason, 397; Pugh v. Wheeler, 2 Dev. & B. 55; Blanchard v. Baker, 3 Greenl. 504; S. C., 23 Am. Dec. 504; Wadsworth v. Tillitson, 15 Conn. 356; S. C., 39 Am. Dec. 391), and does not prevail in California and some other of the mining States and Territories. In those States property in a stream of water on the public lands may be acquired by mere appropriation for mining or other useful purposes, as for irrigation or for the operation of mills, and the first appropriator is, to the extent of his appropriation, the owner as against the world, except the government (Lobdell v. Simpson, 2 Nev. 274; Ophir S. M. Co. v. Carpenter, 4 Nev. 534; Barnes v. Sabron, 10 Nev. 217; 4 Mor. Min. Rep. 673; Strait v. Brown, 16 Nev. 317; Strait v. Brown, 40 Am. Rep. 497; Hill v. Newman, 5 Cal. 445; Kelley v. Natoma Water Co., 6 Cal. 107; Hoffman v. Stone, 7 Cal. 46; Hill v. King, 8 Cal. 336; Bear River, etc. Co. v. New York Mining Co., 8 Cal. 327; McDonald v. Bear River, etc. Co., 13 Cal. 220; Ortman v. Dixon, 13 Cal. 33; Kidd v. Laird, 15 Cal. 161; Phœnix Water Co. v. Fletcher, 23 Cal. 481; Wixon v. Bear River, etc. Co., 24 Cal. 367; Hill v. Smith, 24 Cal. 480; Parks Canal, etc. Co. v. Hoyt, 57 Cal. 44; Crane v. Winsor, 2 Utah, 248; Schillinger v. Rominger, 4 Colo. 100); and such rights have been confirmed by Congress. (Note to Castillero v. United States, 2 Black, 1.) Act of July 26, 1866 (14 Stat. 253).

2. The prior appropriator of a water right on the public domain has the superior title

thereto. Atchison v. Peterson, 20 Wall. 507; Basey v. Gallagher, 20 Wall. 670; Thorp v. Freed, 1 Mont. 652; Irwin v. Phillips, 5 Cal. 332; Butte, etc. Co. v. Vaughn, 11 Cal. 152; Bear River Co. v. New York M. Co., 8 Cal. 332; McDonald v. Bear River Co., 13 Cal. 220; Phœnix Water Co. v. Fletcher, 23 Cal. 482; Hill v. Smith, 27 Cal. 476; Smith v. O'Hara, 43 Cal. 371; Lobdell v. Simpson, 2 Nev. 274; Ophir M. Co. v. Carpenter, 4 Nev. 534; Hobart v. Ford, 6 Nev. 80; Dalton v. Bowker, 8 Nev. 201; Barnes v. Sabron, 10 Nev. 217; 4 Mor. Min. Rep. 673.

3. An owner of a mining claim and the owner of a water right in California hold their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed. Jennison v. Kirk, 98 U. S. 453. (NOTE.—Justice Field, in a note appended to the opinion as published, states "that the customary law of miners is not applicable in California to controversies arising between them or ditch owners, and occupants of the public lands for agricultural or grazing purposes. It has been the general policy of the State 'to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner.' Tartar v. Spring Creek Co., 5 Cal. 398. But at an early day an exception was made to this policy in cases where the interests of agriculturalists and of miners conflicted. By an act passed April 20, 1852, a right of action was given to anyone settled upon the public lands for the purpose of cultivating or grazing against parties interfering with his premises, or injuring his lands where the same were designated by distinct boundaries, and did not exceed one hundred and sixty acres in extent: with a proviso, however, that if the lands contained mines of precious metals the claim of the occupant should not preclude any persons desiring to do so from working the mines as fully and unreservedly as they might or could do had no possession or claim been made for grazing or agricultural purposes. Stat. at L., 1852, p. 158. Under this Act the Supreme Court of the State held that miners, for the purpose simply of mining, could enter upon the land thus occupied, but that the act legalized what would otherwise have been a trespass, and could not be extended by implication to a class of cases not specially provided for. Accordingly, ditches thus constructed over lands thus held, without the consent of the occupant, though designed to convey water to mining localities for the purpose of mining, were held to be nuisances, and upon the complaint of the occupant were ordered to be abated. Stokes v. Barrett, 5 Cal. 37; McClintock v. Bryden, 5 Cal. 97; Fitzgerald v. Urton, 5 Cal. 308; Burdge v. Underwood, 6 Cal. 46; Weimer v. Lowery, 11 Cal. 104. Section 9 of an Act for the sale of the lands of the United States in the territory northwest of the Ohio river and above the mouth of Kentucky river, approved May 18, 1796 (1 Stat. 464–468), provides: 'That all navigable rivers within the territory to be disposed of by virtue of this act shall be deemed to be and remain public highways; and that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both.'")

4. The subject of water rights upon the public lands is governed by the provisions of the act of July 26, 1866 (14 Stat. 253), re-enacted by the act of May 10, 1872 (17 Stat. 91), and now embodied in section 2339, United States Revised Statutes.

5. "It is the established doctrine of this court that the rights of miners and rights of persons who had constructed canals and ditches to be used in mining operations and irrigation, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the act of 1866." Said act, section 2339, United States Revised Statutes, is simply declaratory of then existing rights. Broder v. Natoma Water & M. Co., 101 U. S. 274; 50 Cal. 621; 4 Mor. Min. Rep. 670; 5 Mor. Min. Rep. 33.

6. The act of 1866 (14 Stat. 253, sec. 2339, U. S. Rev. Stat.) conferred no additional rights upon owners of ditches thereafter constructed, said act being merely a congressional sanction of pre-existing rights under local rules, customs and decisions. Jennison v. Kirk, 98 U. S. 453; 4 Mor. Min. Rep. 504. (Affirming Titcomb v. Kirk, 51 Cal. 288; 5 Mor. Min. Rep. 10.)

7. The act of 1866, section 2339, United States Revised Statutes, introduced no new

system of law concerning water rights, but recognized and sanctioned the existing common law of the Western States. Jones v. Adams, 19 Nev. 78. (Overruling Van Sickle v. Haines, 7 Nev. 249; 15 Mor. Min. Rep. 201.)

8. Section 9 of the act of 1866 is not retroactive in its effect, and patents theretofore granted are not affected thereby. Said act merely recognized and confirmed rights held under local customs, laws and decisions. Union Mtn. M. Co. v. Ferris, 2 Sawy. 176; 8 Mor. Min. Rep. 90.

9. Section 2339, United States Revised Statutes (Act of July 26, 1866, sec. 9, 14 Stat. 253), is a grant of a right of way over the public domain for certain enumerated purposes. Hobart v. Ford, 6 Nev. 77; 15 Mor. Min. Rep. 236.

10. The doctrine as to water rights, etc., under the act of July 26, 1866, applies only to public lands. No rights can be acquired thereunder where the title to the lands upon which the stream is situated has passed from the government; but the owner of the land is the owner of the stream, and the common-law rule prevails. Union Mtn. M. Co. v. Ferris, 2 Sawy. 176; 8 Mor. Min. Rep. 90; Van Sickle v. Haines, 7 Nev. 249; 15 Mor. Min. Rep. 201. (Overruled in Jones v. Adams, 19 Nev. 78.) Crandall v. Woods, 8 Cal. 136; Leigh v. Independent Ditch Co., 8 Cal. 323.

11. Where the right to water under the act of July 26, 1866, by appropriation, is once vested, a subsequent grantee from the government takes subject to it. Broder v. Natoma Water, etc. Co., 101 U. S. 274; 50 Cal. 621; 4 Mor. Min. Rep. 670; 5 Mor. Min. Rep. 33; Barnes v. Sabron, 10 Nev. 217; 4 Mor. Min. Rep. 673; Osgood v. Eldorado, etc. Co., 56 Cal. 571; 5 Mor. Min. Rep. 37.

12. The right to the use of water, acquired by appropriation thereof on the public domain, has been recognized in the Western States. Atchison v. Peterson, 20 Wall. 507.

13. Under the act of July 26, 1866 (14 Stat. 251, sec. 2339, U. S. Rev. Stat.), no title is acquired to a right of way for a ditch until actual possession is taken. Bybee v. Oregon & California R. R. Co., 139 U. S. 663.

14. The act of 1866 (sec. 2339, U. S. Rev. Stat.) had three objects: 1. Confirmation of existing water rights. 2. Grant of right of way over public lands for construction of flumes or canals for mining or manufacturing purposes. 3. Grant of right to occupants of public lands to sue for damages caused by construction of such flumes or canals. Hobart v. Ford, 6 Nev. 77; 15 Mor. Min. Rep. 236.

14a. Controversies arising under section 2339, United States Revised Statutes, involving rights to the use of water for mining, agricultural, manufacturing or other purposes, and the right of way for the construction of ditches and canals, etc., are matters lying exclusively within the jurisdiction of the courts for decision. Com'r to A. V. Howard, Aug. 3, 1891.

15. An easement of a water right (or a right of way for a flume) is not a proper basis of an adverse claim under section 2326, United States Revised Statutes, but is protected by sections 2339, 2340, United States Revised Statutes. Rockwell v. Graham, 9 Colo. 36; 10 Pac. Rep. 284; 15 Mor. Min. Rep. 299.

16. Grants by the United States of its public lands bounded by streams or other waters made without reservation relative thereto are to be construed, as to riparian rights, according to the law of the State in which the land is situate. Hardin v. Jordan, 140 U. S. 371.

17. The right to mine confers the right to divert streams from natural channels, and when these rights conflict the question to be decided is one of priority. Irwin v. Phillips, 5 Cal. 140 (1855).

18. A prior locator of a mining claim on the banks of a stream has the right to use the bed for working his claim, and any subsequent embankment or dam which interferes with his use is an encroachment upon his rights, and he is entitled to recover. Sims v. Smith, 7 Cal. 148 (1857).

19. A water right is a right to take only necessary water without unduly injuring other rights. Atchison v. Peterson, 20 Wall. 507; Butte Co. v. Vaughn, 11 Cal. 143; Ortman v. Dixon, 13 Cal. 33; Lobdell v. Simpson, 2 Nev. 274.

20. A United States patent for public land carries with it riparian rights. Van Sickle v. Haines, 7 Nev. 249; 15 Mor. Min. Rep. 201. (Overruled in Jones v. Adams, 19 Nev. 78.)

21. Mere appropriation of water confers no right against a subsequent patentee of the land whence the water comes. Van Sickle v.

Haines, 7 Nev. 249; 15 Mor. Min. Rep. 201. (Overruled in Jones v. Adams, 19 Nev. 78.)

22. A patentee of mining land, over which an adjoining owner had for several years, by local custom and from necessity, maintained a water ditch to carry detritus from an hydraulic mine to a river, took subject to the easement. Jacob v. Day, 44 Pac. Rep. 248 (Cal.).

23. In the absence of a local custom allowing it, one miner has no right to run a tail-race or flume over the claim of another, and the owner of such claim may fill up such race or flume by tailings deposited on his own ground. Ralston v. Plowman, 1 Idaho, 595; 5 Mor. Min. Rep. 160.

24. The riparian rights of a patentee of public land attach only on the issuance of patent and do not relate to acts previous thereto so as to cut off water rights acquired by appropriation prior to issuance of the patent. Osgood v. Eldorado Water, etc. Co., 56 Cal. 571; 5 Mor. Min. Rep. 87.

25. Though the patentee of lands bordering on a navigable stream takes only to the stream, he has the right to erect wharves subject to public uses of the river. Railway Co. v. Schurmeir, 7 Wall. 272; Yates v. Milwaukee, 10 Wall. 492.

26. Riparian rights attach if the land at date of patent is bounded by navigable water. Hardin v. Jordan, 16 Fed. Rep. 283. See 140 U. S. 371.

27. "Meander" lines of the survey of lands bordering on water do not mark the lines of a claim to such lands, but are run for the purpose of approximately fixing the area of the land. The patentee takes to the actual water line, at least. Railway Co. v. Schurmeir, 7 Wall. 272.

28. The shore and bed of a navigable river belong to the State by virtue of its sovereignty. Pollard's Lessees v. Hagan, 3 How. 212; Goodtitle v. Kibbe, 9 How. 471.

29. The bed of a river in California belongs to the State. Woodruff v. North Bloomfield Co., 18 Fed. Rep. 753.

30. The right of defendants to mine in, and use therefor, a certain ravine, above the plaintiff's premises, must be exercised in such manner as not to damage the prior right of the plaintiff to inhabit and cultivate his premises, and to the use of his dam appurtenant thereto. Levaroni v. Miller, 34 Cal. 231; 12 Mor. Min. Rep. 232 (1867).

31. The State or Territorial legislature may provide rules for working mines surrounded by other property. Com'r to F. A. Hendricks, Dec. 2, 1878, 5 C. L. O. 146.

32. The owner of a water right may change the point of diversion and use of the water without losing his priority, provided such change does not injure others. Fuller v. Swan River Placer M. Co., 19 Pac. Rep. 836.

33. The Willamet river is a navigable river. Iron Bridge Co. v. Hatch, 19 Fed. Rep. 847.

34. The fact that land is covered by a water right held under local laws will not bar entry thereof as a mill site. Charles Lennig, 5 L. D. 190.

35. The fact that a mining claim is subject to an easement in the shape of a right of a railroad company to lay tracks and place necessary station buildings on the same, will not prevent the issuance of patent under the mineral land laws. Eugene McCarthy, 14 L. D. 105.

36. Measurement of running water in Colorado is regulated by statute. Sec. 643, Mills' Ann. Stat., ed. 1891.

37. "Miners' inch" in California is not a fixed unit of measure. Dougherty v. Haggin, 56 Cal. 522; 15 Mor. Min. Rep. 211.

38. The Land Department does not issue patents for water power rights. Com'r to G. A. Daniels, Dec. 5, 1891.

39. A ditch owner whose ditch runs over the claim of another may acquire a right to maintain his ditch, under the Statute of Limitations. McLaughlin v. Del Re, 17 Pac. Rep. 515.

40. Where water from defendant's ditch discharged into a stream just above the head of plaintiff's ditch, the fact that plaintiff used the water so escaping from defendant's ditch for a period of fourteen years without interference by defendant does not create a right to use the same by prescription, for the use under such circumstances did not constitute any invasion of the rights of defendant, it being neither exclusive, adverse, hostile, or under a claim of right. Wimer v. Simmons, 27 Oreg. 1; 39 Pac. Rep. 6.

41. A water right cannot be secured under the placer law. W. A. Chessman, 2 L. D. 774.

42. A prior locator may erect a dam reasonably necessary to the working of his claim, even if it injures a subsequent locator, if au-

thorized by local customs. Stone v. Bumpus, 46 Cal. 218; 4 Mor. Min. Rep. 278.

43. A water right may be lost by the adverse possession of another; but in such cases non-user by the owner, and adverse possession by another for a period equal to that fixed by the Statute of Limitations relating to real property, are necessary to divest title. Wimer v. Simmons, 27 Oreg. 1; 39 Pac. Rep. 6.

MINERAL LANDS, IN WHICH NO VALUABLE MINES HAVE BEEN DISCOVERED, OPEN TO HOMESTEADS.

(See CHARACTER OF LAND, p. 337.)

I. THE STATUTE.

Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title, relating to "HOMESTEADS." 14 Stat. 253; sec. 2341, U. S. Rev. Stat.

MINERAL LANDS — HOW AGRICULTURAL LANDS ARE SEGREGATED THEREFROM.

I. THE STATUTE.

Upon the survey of lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same. 14 Stat. 253; sec. 2342, U. S. Rev. Stat.

ADDITIONAL LAND DISTRICTS — HOW CREATED.

(See LAND DEPARTMENT, p. 423.)

I. THE STATUTE.

The President is authorized to establish additional land-districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter. 14 Stat. 252; sec. 2343, U. S. Rev. Stat.

GRANT.

I. THE STATUTE.
II. DECISIONS.
1. *Railroad.*
2. *State.*
3. *Patent.*
4. *Mining Claim.*
5. *General.*

I. THE STATUTE.

No act passed at the first session of the thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant. 13 Stat. 576; 18 Stat. 476; sec. 2346, U. S. Rev. Stat.

II. DECISIONS.

1. *Railroad.*

1. Grants of public land shall not be construed as passing title to mineral lands, "which in all cases shall be, and are reserved to the United States, unless otherwise specifically provided," etc. Joint resolution of Jan. 30, 1865, 15 Stat. 567.

2. "The policy of Congress as expressed in its numerous grants of public lands to aid in the construction of railroads has always been to exclude the mineral lands from them, and reserve them for special disposition, as seen in the following acts among others: Acts of July 1, 1862, C. 120, 12 Stat. 489, and of July 2, 1864, C. 216, 13 Stat. 356, making grants to the Union and Central Pacific Companies; Act of July 4, 1866, C. 165, 14 Stat. 83, making a grant to the Iron Mountain Railroad Company; Act of July 13, 1866, C. 182, 14 Stat. 94, making a grant to the Placerville, etc., Railroad; Act of July 25, 1866, C. 242, 14 Stat. 239, making a grant to the California and Oregon Railroad, sections 2 and 10; Act of July 27, 1866, C. 278, 14 Stat. 292, making a grant to the Atlantic and Pacific Railroad and to the Southern Pacific Railroad; Act of March 2

1867, C. 189, 14 Stat. 548, making a grant to the Stockton and Copperopolis Railroad; Act of March 3, 1871, C. 122, 16 Stat. 573, making a grant to the Texas Pacific Railroad." Barden v. Northern Pacific R. R. Co., 154 U. S. 288.

3. Grants of lands to States will be held to exclude mineral lands whether or not they are expressly reserved, as such has been the continued policy of the government. Ivanhoe M. Co. v. Keystone M. Co., 102 U. S. 167: Pereira v. Jacks, 15 L. D. 273. See, also, sec. 2318, U. S. Rev. Stat.

4. Lands valuable for minerals other than coal and iron are not included in the grant to the Central Pacific Railroad Company. G. D. Smith, 13 C. L. O. 28.

5. If land within the limits of the grant to the Northern Pacific Railroad Company (from which all minerals other than coal and iron were excepted) is discovered to be mineral in character at any time before the issuance of patent therefor to the company, it is excepted from the grant. Barden v. Northern Pacific R. R. Co., 154 U. S. 288. (Citing and approving Central Pacific R. R. Co. v. Valentine, 11 L. D. 238—strong dissenting opinion.)

6. Although the grant to the railroad company is one *in præsenti*, and the land may have been returned as non-mineral by the United States Surveyor General prior to the grant, the fact as to whether the same is mineral or not, and is or is not excepted from the grant because of its mineral character, may be determined by the Land Department at any time prior to the issuance of patent to the railroad company, and the discovery of the mineral character of the land at any time prior to the issuance of patent therefor under a grant excepting mineral lands will exempt the land from the operation of the grant. Central Pacific R. R. Co. v. Valentine, 11 L. D. 238; North Star M. Co. v. Central Pacific R. R. Co., 12 L. D. 608; Southern Pacific R. R. Co. v. Allen G. M. Co., 13 L. D. 165; Northern Pacific R. R. Co. v. Champion Cons. M. Co., 14 L. D. 699; O'Conner v. Northern Pacific R. R. Co., 15 L. D. 247; Winscott v. Northern Pacific R. R. Co., 17 L. D. 274; Northern Pacific R. R. Co. v. Marshall, 17 L. D. 545. See, also, Samuel W. Spong, 5 L. D. 193.

7. The tract in question never having been patented to the railroad company, the Department may at any time prior thereto investigate the mineral character thereof, and the fact that the railroad company has sold the land will not alter the case; nor will the fact that upon its application on an *ex parte* proceeding the land had been found to be agricultural in character prevent a further hearing on this question. North Star M. Co. v. Central Pacific R. R. Co., 12 L. D. 608.

8. The exception of mineral lands from the grant to the Central Pacific Railroad Company only extends to lands known to be mineral, or apparently mineral, at the time when the grant attached, and a discovery of a gold mine in the lands after the title has vested by full performance of the conditions and filing of map of definite route does not defeat the title. Francoeur v. Newhouse, 14 Sawy. 351; 40 Fed. Rep. 618; 43 Fed. Rep. 238; Valentine v. Valentine, 47 Fed. Rep. 597; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348; Cowell v. Lammers, 10 Sawy. 246; 21 Fed. Rep. 200; 8 West Coast Rep. 504; Northern Pacific R. R. Co. v. Barden, 46 Fed. Rep. 592. (Reversed, 154 U. S. 288.) See, also, Davis' Adm'r v. Weibbold, 139 U. S. 507.

9. If land is claimed under the mineral land laws at date of the definite location of the railroad, the land so claimed is excepted from the grant to the company, even though said claim is subsequently shown to be invalid. Northern Pacific R. R. Co. v. Sanders, 49 Fed. Rep. 129.

10. Any claim to public land under the land laws, whether rightful or not, at date of the grant to a railroad company or at date of filing its map of definite location, will except such land from the operation of the grant. Whitney v. Taylor, 157 U. S. 85; Northern Pacific R. R. Co., 20 L. D. 514; Com'r to Helena Office, April 19 and Sept. 8, 1893, *In re* Sanders v. Northern Pacific R. R. Co.

11. If at the date of a grant to a railroad company or at the date of the definite location of the road the land is claimed under the United States land laws or is reserved from sale, it does not pass under the grant, and a subsequent reversion of the land to the public domain by the vacation or abandonment of the claim or reservation will not cause the grant to attach thereto. Kansas Pacific R. R. Co. v. Dunmeyer, 113 U. S. 629; Hastings & Dakota R. R. Co. v. Whitney, 132 U. S. 357; Sioux City, etc. Co. v. Griffey, 143

U. S. 32; United States v. Southern Pacific R. R. Co., 146 U. S. 570; Winona & St. Peter R. R. Co., 9 L. D. 649; Dellone v. Northern Pacific R. R. Co., 16 L. D. 229.

12. The location of a mine on a tract prior to a grant does not establish the fact of the mineral character of such tract nor operate to except the same from the grant where mineral does not exist in paying quantities and mining operations have been abandoned. Berry v. Central Pacific R. R. Co., 15 L. D. 463.

13. Land shown to contain mineral in sufficient quantities to justify a reasonable person in spending money and labor for its extraction is mineral in character and as such excepted from the grant to the Northern Pacific Railroad Company. Casey v. Northern Pacific R. R. Co., 15 L. D. 439.

14. Phosphate lands in Florida were not excepted from the grant of June 22, 1874 (18 Stat. 194), to the Florida Railway and Navigation Co. Tucker v. Florida Railway & Navigation Co., 19 L. D. 414.

15. A railroad grant is not defeated, after definite location of the road, by the location of a stone placer under the act of August 4, 1892. Com'r to Helena Office, Oct. 20, 1892, *In re* Northern Pacific R. R. Co. v. Sweeney.

16. Coal and iron are not to be construed as minerals to be excepted from the grants to the Central Pacific and Union Pacific Railroad Companies. Act of July 2, 1864 (13 Stat. 356).

17. Where a mining claim is located subsequent to the definite location of the railroad, partly within an odd-numbered section within the grant and partly without said section, the discovery upon which the location was based being upon the latter portion of the claim, it devolves upon the mineral claimant to show the mineral character of that portion of his claim in the odd-numbered section. Departmental decision of Sept. 23, 1892, *In re* Zero Lode.

18. Salt is a mineral, and lands containing valuable deposits of salt are excepted from the grant to the Central Pacific Railroad Company. Eagle Salt Works, 5 C. L. O. 4.

19. The exception of mineral lands from grants of land to railroad companies and to States does not reserve from the operation of such grants other than the metalliferous minerals. Com'r to Spokane Office, Aug. 13, 1896, *In re* Pacific Coast Marble Co. v. Northern Pacific R. R. Co. and State of Washington. (Citing Tucker v. Florida Railway & Navigation Co., 19 L. D. 414; Wheeler v. Smith, 5 Wash. St. 704.)

20. Railroad companies claiming under grants of non-mineral lands are not entitled to be notified of the allowance or approval of mineral entries within the limits of their grants prior to selection of the land by the companies. Northern Pacific R. R. Co., 13 L. D. 691.

21. A hearing to determine the character of the land claimed under a railroad grant, but returned as mineral, will not be allowed in the absence of application to select the same. Central Pacific R. R. Co., 8 L. D. 30; 9 L. D. 613.

22. A hearing to determine the mineral or non-mineral character of a tract should not be ordered until an affirmative showing as to its agricultural character is made, where a showing to the contrary has been made by a mineral applicant. O'Connor v. Northern Pacific R. R. Co., 15 L. D. 247.

23. The authority of the Land Department to order a hearing between the company and a mineral applicant as to the character of the land is not affected by a prior *ex parte* proceeding on behalf of the company in which the land was found to be agricultural. North Star M. Co. v. Central Pacific R. R. Co., 12 L. D. 608.

24. Where a selection is made under its grant, by a railroad company, of land returned as mineral, or within well-known mineral belts, or within six miles of a mining claim of record in the General Land Office, the company must submit evidence of its non-mineral character after publication of notice for ten weeks. Departmental Instructions, July 9, 1894, and August 15, 1894, 19 L. D. 21, 105.

25. In the adjustment of railroad grants, the non-mineral character of the lands cannot be considered as established alone by the fact that the return of the United States Surveyor General does not show said land to be mineral. California & Oregon R. R. Co., 16 L. D. 262.

26. Where land covering a mineral claim has been selected by a railroad company under its grant, the mineral claimant, to protect his rights, should file affidavits alleging the mineral character of the land and ask a hearing to determine its character. If the

land is found to be mineral in character, the selection will be canceled and the land left open to application under the mineral laws. Com'r to Charles E. Case, July 21, 1892; Com'r to John A. Hearn, Sept. 16, 1892.

27. A mineral claimant whose claim is situate within an odd-numbered section of land within the limits of a railroad grant, if the section has not been selected or listed, may make application and entry without regard to the railroad grant. Com'r to John A. Hearn, Sept. 16, 1892.

28. Where a railroad company has been granted a right of way over public lands, and in pursuance of such grant has either actually constructed its road or has filed its map showing the location of the road, grants to individuals, based on any after-acquired rights, are made subject to the right of the company, and the patents issued as evidence of such subsequent grants should contain a reservation of the rights of the company. Dakota Central R. R. Co. v. Downey, 8 L. D. 115; Pensacola & Louisville R. R. Co., 19 L. D. 386.

29. But such reservation will not be inserted in patents if there is any doubt as to the right of the company. Mary G. Arnett, 20 L. D. 131; Florida Central, etc. R. R. Co., 22 L. D. 45. (See as to the illegality of reservations in patents, Deffeback v. Hawke, 115 U. S. 392.)

30. Under a grant of non-mineral lands a railroad company cannot select mineral lands as indemnity for losses from its grant of lands in place. Southern Pacific R. R. Co. v. Allen G. M. Co., 13 L. D. 165.

31. The mineral or non-mineral character of the lands within the grant to the Northern Pacific Railroad Co. in the States of Idaho and Montana are to be determined by boards of mineral land commissioners appointed by the President. Act of February 26, 1895 (commonly called the Idaho-Montana Act), 28 Stat. 683. For circulars under this act, see 20 L. D. 350, 522, 561, 571.

32. Mineral lands do not pass to the Central Pacific Railroad by virtue of its grant, but the timber upon the mineral land within the ten-mile limits goes to the road, except what is necessary for the improvements of mine owners thereon. (Act of July 2, 1864, 13 Stat. 356.) Central Pacific R. R. Co. v. Mammoth Blue Gravel Co., 1 C. L. O. 134.

33. Section 4, act of July 2, 1864 (13 Stat. 358), reserving certain lands from the grant to the Central Pacific Railroad Company, is erroneously printed in the Statutes at Large; the correct reading being: "And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler *on* any lands returned and denominated as mineral lands," etc. McLaughlin v. Menotti, 105 Cal. 572.

2. *State.*

34. As to all of the Western States except California and Nevada, reservations of sections 16 and 36 were made, prior to the admission of the States, that they might be granted to the States when the States should be admitted into the Union. The absolute grants of land were generally made a part of the enabling acts. By such reservations, sections 16 and 36 were excluded from sale under other than the mineral laws. Sections 6 and 7 of the act of March 3, 1853, granted sections 16 and 36 to the State of California, with indemnity for losses of such sections because of settlements thereon, private claims thereto, or public uses thereof. (No indemnity for mineral lands.) 10 Stat. 246, 247.

35. Sections 1946, 1947, United States Revised Statutes. Reservation for Arizona, Feb. 24, 1863, 12 Stat. 665; Reservation for Colorado, Feb. 28, 1861, 12 Stat. 176; Reservation for Dakota, March 2, 1861, 12 Stat. 243; Reservation for Idaho, March 3, 1863, 12 Stat. 814; Reservation for Montana, May 26, 1864, 13 Stat. 91; Reservation for New Mexico, Sept. 9, 1850, 9 Stat. 452, sec. 15; Reservation for Utah, Sept. 9, 1850. 9 Stat. 457, sec. 15; Reservation for Washington, March 2, 1853, 10 Stat. 179; Reservation for Wyoming, July 25, 1868, 15 Stat. 183.

36. In lieu of sections 16 and 36, the State of Nevada was granted two million acres of public land. Act June 16, 1880 (21 Stat. 287).

37. As to lands previously surveyed, the right of a State under its school grant attaches, if at all, at the admission of the State. To be excepted from the grant because of its mineral character, such land must be known to be mineral in character at the date of admission of the State. State of Colorado, 6 L. D. 412; Boulder & Buffalo M. Co., 7 L. D.

54; Fleetwood Lode, 12 L. D. 604; Warren v. State of Colorado, 14 L. D. 681; State of Washington v. McBride, 18 L. D. 199.

38. Under a grant of school lands, "The State's title vests, if at all, at the date of the completion of the survey (Cooper v. Roberts, 18 How. 173; Virginia Lode, 7 L. D. 459); and, if the land, although in reality mineral, was not then *known* to be mineral, the subsequent discovery of its mineral character would not devest the title which had already passed." Abraham L. Miner v. State of California, 9 L. D. 409; State of California v. Poley, 4 C. L. O. 18; J. Dartt, 5 C. L. O. 178; Town of Silver Cliff v. State of Colorado, 6 C. L. O. 152; State of Colorado, 6 L. D. 412; 7 L. D. 490; Virginia Lode, 7 L. D. 459; Warren v. State of Colorado, 14 L. D. 681; Pereira v. Jacks, 15 L. D. 273; Frees v. State of Colorado, 22 L. D. 510; Com'r to J. A. Coffer, Oct. 8, 1891.

39. A State admitted before the survey of lands is entitled to sections 16 and 36 under its school grant, if they are not known to be mineral at date of the approval of the survey, and a discovery of mineral thereon subsequently will not defeat the right of the State. The State acquires no rights, however, by an irregular survey which is approved and thereafter suspended. Virginia Lode, 7 L. D. 459.

40. Until lands are surveyed, a State can acquire no title to them under its grant. Heydenfeldt v. Daney G. & S. M. Co., 93 U. S. 634; 13 Mor. Min. Rep. 204. See, also, 10 Nev. 290.

41. Although there is no statutory reservation of land for school purposes in Alaska, as the government owns the land, the Secretary of the Interior will order reserved from sale those lands used for educational purposes. Departmental Instructions, 18 L. D. 288.

42. Mineral lands are excluded from the school grant to California as well as from those to other States. Ivanhoe M. Co. v. Keystone M. Co., 102 U. S. 167; Hermocilla v. Hubbell, 89 Cal. 5; Delaney v. Thomas, 2 C. L. O. 50; James Craig, 6 C. L. O. 45; Silver Cliff Town Site v. State of Colorado, 6 C. L. O. 152; Boulder & Buffalo M. Co., 7 L. D. 54. *Contra*, Higgins v. Houghton, 25 Cal. 252; 13 Mor. Min. Rep. 195.

43. Coal lands are excepted from State grants as mineral by the act of June 1, 1864 (13 Stat. 343). United States v. Mullan, 7 Sawy. 466; 10 Fed. Rep. 785; 118 U. S. 271.

44. Land returned by the United States Surveyor General as mineral does not pass to a State under a school land grant. Giovanni Le Franchi, 3 L. D. 229.

45. An application to enter a school section in California under the coal land law should be received because under the grant to the State mineral lands are excluded. Com'r to Shasta Office, Nov. 3, 1874, 1 C. L. O. 135.

46. The exception of mineral lands from grants to States and railroad companies does not reserve from such grants lands containing other than the metalliferous minerals. Land containing a deposit of marble, though of fine quality, is not excepted from such grants. Com'r to Spokane Office, Aug. 18, 1896, *In re* Pacific Coast Marble Co. v. Northern Pacific R. R. Co. and State of Washington. (Citing Tucker v. Florida Railway & Navigation Co., 19 L. D. 414; Wheeler v. Smith, 5 Wash. St. 704.)

47. An application for patent for land embracing a school section in the Territory of Dakota, alleged to be more valuable because of a stone quarry than for agricultural purposes, should be received notwithstanding an injunction from a court prohibiting the mineral applicant from trespassing on the alleged claim of the Territory. Dells M. Co., 18 C. L. O. 159.

48. School sections containing coal are subject to disposal as mineral lands. Charles Norager, 10 C. L. O. 54.

49. Coal entries may be made on sections 16 and 36 in the Territories. Henry Wood, 2 L. D. 762.

50. Land surveyed prior to the admission of a State, and known to contain coal at the date of such admission, does not pass under a grant of school lands to the State. State of Montana v. Buley, 23 L. D. 116.

51. Coal declaratory statements for land in sections 16 and 36 may be received, with opportunity accorded the State to show why they should not be allowed. State of Colorado, 7 L. D. 490.

52. One who applies for patent for a lode claim situate in a school section may be allowed to show that the land was known to be mineral in character at the date of the admission of the State and hence excepted from

the grant to the State. Fleetwood Lode, 12 L. D. 604.

53. Mineral lands are excepted from grants to States even though not expressly reserved by the terms of the grant. Ivanhoe M. Co. v. Keystone M. Co., 102 U. S. 167; Keystone Lode and Mill Site v. Nevada, 15 L. D. 259.

54. The act of August 4, 1892 (27 Stat. 348), does not constitute lands chiefly valuable for building stone "mineral lands," in the general sense in which the term "mineral" is used in the reservation of "mineral lands" from grants to States for school purposes. South Dakota v. Vermont Stone Co., 16 L. D. 263.

55. A mineral entry of land principally valuable for ordinary building stone, allowed under the then existing practice (prior to Departmental decision, *In re* Conlin v. Kelly, 12 L. D. 1), excepts the land so entered from the operation of a subsequent grant to a State for school purposes, and may be passed to patent. Paris Gibson, 21 L. D. 327.

56. General grants of indemnity lands to States, act of May 20, 1826 (4 Stat. 179). Act of Feb. 26, 1859 (11 Stat. 385).

57. The act of February 28, 1891, amendatory of sections 2275 and 2276, United States Revised Statutes, provides generally for the selections of indemnity lands by States where the land which would otherwise pass to them by grants of school land is mineral in character, or reserved or claimed. Indemnity may also be taken for school lands not yet surveyed, embraced in a reservation. 26 Stat. 796.

58. An act to enable the State of Colorado to take lands in lieu of the sixteenth and thirty-sixth sections found to be mineral lands. Approved April 2, 1884 (23 Stat. 10). 14 C. L. O. 57, 58, 260; 11 C. L. O. 29; State of Colorado, 6 L. D. 412.

59. The legislation subsequent to the act of 1819, while resulting in a particular method for the disposition of the mineral land, did not operate to repeal the said act or to abridge the right of the State to the sixteenth section, or to select indemnity therefor. State of Alabama, 15 C. L. O. 7.

60. Indemnity selections may be made in lieu of mineral lands yet unsurveyed, but which it is known will fall in sections 16 or 36 when surveyed. Com'r to La Grande Office, Nov. 21, 1894.

61. Land returned as mineral in character is not subject to selection by a State as school indemnity land, until the return has been overcome by testimony submitted after publication of notice, under paragraph 110 of the Mining Circular as amended July 2, 1894 (19 L. D. 21). State of California, 22 L. D. 402.

62. The fact that sections 16 and 36 are mineral lands, and therefore excepted from the grant of school lands to the State of California, does not give the State the right to select lands in lieu thereof. State of California, 5 C. L. O. 34. But see act of Feb. 28, 1891 (26 Stat. 796).

63. Lands known to be valuable for coal are not subject to indemnity selection by the State of California for lands lost under its school land grant, and, if a patent issues to the State for lands so known at date of issuance of patent, the United States may bring suit in equity to vacate the patent. Mullan v. United States, 118 U. S. 271; 7 Sawy. 466; 10 Fed. Rep. 785.

64. If lands claimed by a State under the grant excepting mineral lands are discovered to be mineral before certification to the State, they do not pass under the grant. State of California, 7 L. D. 490. (Contrary to other Departmental decisions, and expressly overruled in case of Abraham L. Miner v. State of California, 9 L. D. 408.)

65. The State of Utah having had no grant of saline lands, such lands therein are not subject to sale under the act of January 12, 1877 (19 Stat. 221). Salt Bluff Placer, 7 L. D. 549.

66. Lands between high and low tides on the shores of navigable waters are reserved to the States, and mineral lands thereon cannot be sold by the United States. Frank Burns, 10 L. D. 365; William E. Morris, 9 C. L. O. 5; Com'r to W. C. Renfrow, March 14, 1892.

67. A mining claim located below low-water mark on a navigable river in California is not patentable, such land belonging to the State. Com'r to S. T. Dunlap, June 30, 1892.

68. Absolute property in, and dominion and sovereignty over, the soils under the waters in the States are reserved to the several States, and the new States have the same rights, sovereignty and jurisdiction in that respect as the original States possess within their respective borders. Knight v. United

States Land Ass'n, 142 U. S. 161. (Citing Martin v. Waddell, 16 Pet. 367; Pollard v. Hagan, 3 How. 212; Goodtitle v. Kibbe, 9 How. 471; Mumford v. Wardwell, 6 Wall. 423; Weber v. State Harbor Commissioners, 18 Wall. 57; Ward v. Mulford, 30 Cal. 365.)

3. *Patent.*

(See PATENT, p. 264.)

69. "The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of the court." United States v. Stone, 2 Wall. 525. (Quoted approvingly in Mullan v. United States, 118 U. S. 271.)

70. Patent evidences a grant, and the presumption is that all acts have been performed and all facts have been shown which are prerequisites to its issuance. Green v. Barker, 66 N. W. Rep. 1032.

71. Where a tract of land was certified to the Central Pacific Railroad Company as agricultural in character, no minerals being known to exist therein, the legal title passed, and the discovery of minerals thereafter cannot affect the rights of the railroad company thereto. Samuel W. Spong, 5 L. D. 193.

72. Certification by the Commissioner of the General Land Office to a State, of lands selected by the State as indemnity for losses under its school grant of sections 16 and 36, has the full force and legal effect of the issuance of a patent to the State. Durand v. Martin, 120 U. S. 366; McCreery v. Haskell, 121 U. S. 327.

73. A patent issued to a State under a school land grant for known mineral lands will be vacated on suit by the United States. United States v. Mullan, 7 Sawy. 466; 10 Fed. Rep. 785; 118 U. S. 271.

74. If land known to be valuable for mineral is patented to a railroad company under a grant excepting mineral lands, the United States has such an interest in the matter as would warrant the Secretary of the Interior in recommending suit to vacate the patent. Bullock v. Central Pacific R. R. Co., 11 L. D. 590.

75. On the allegation, duly corroborated, that certain land patented to a railroad company was in fact excepted from the grant by reason of its known mineral character, a hearing may be directed to ascertain whether the facts justify judicial proceedings for the recovery of title. Bullock v. Central Pacific R. R. Co., 11 L. D. 590.

76. A patent to a railroad company is not conclusive evidence that the land is non-mineral in character, and a party claiming under a subsequent mining patent may show that the land is mineral, and upon such showing being made his title will be quieted. Chicago Qtz. M. Co. v. Oliver, 75 Cal. 194.

77. Lands not known to be mineral in character at the date of the issuance of patent therefor to a railroad company pass by the patent, even though the grant to the company excluded mineral lands. Samuel W. Spong, 5 L. D. 193.

78. If mineral lands have been patented to a railroad company they are not subject to location or patent under the mining laws until the railroad patent has been set aside. G. D. Smith, 13 C. L. O. 28.

4. *Mining Claim.*

(See MINING CLAIM, p. 1.)

79. "A valid and subsisting location of mineral lands made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States, of the right of present and exclusive possession of the lands located." Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795; Russell v. Chumasero, 4 Mont. 309; 1 Pac. Rep. 713; 15 Mor. Min. Rep. 508; Branagan v. Dulaney, 2 L. D. 744.

80. Mining claims held by possessory title are property in the fullest sense of the word, and may be sold, transferred, mortgaged and inherited, and a location in accordance with law has the effect of a grant by the United States of the right of present and exclusive possession. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183; Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510. (See 3 Mont. 65.) Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611; Manuel v. Wulff, 152 U. S. 505. See 9 Mont. 279; 23 Pac. Rep. 723.

81. The valid location of a mining claim is a grant from the government to the person making the location. The location is the inception of the grant, and the patent is its consummation. The grant is kept alive by representation (work). A failure to represent forfeits the grant, and makes void the title acquired by location, and the ground thereupon becomes again subject to location and purchase. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

82. The location of a mining claim and the maintenance thereof confers a vested right in the nature of a grant from the United States, and the locator may not be divested of such right without it is by the exercise of the right of eminent domain, in which case he must be compensated therefor. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

83. A valid location of a mining claim excepts the land located from the public domain as by a grant. Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076.

84. To make the grant effectual, the location must be distinctly marked on the ground, and the record must contain such a description as will identify the claim by reference to some natural object or permanent monument. Neither the grant nor the right of possession attach to locations that do not give the notice required. Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. Rep. 714.

85. Mining claims should be conveyed by deed, being realty granted by the United States mining laws. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196; Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287. *Contra*, Union Cons. M. Co. v. Taylor, 100 U. S. 37; 5 Mor. Min. Rep. 323; Table Mtn. T. Co. v. Stranahan, 20 Cal. 198; 9 Mor. Min. Rep. 457; Gatewood v. McLaughlin, 23 Cal. 178; Patterson v. Keystone M. Co., 23 Cal. 576; Hardenbergh v. Bacon, 33 Cal. 381.

86. The statutory grant to miners of the right to explore and occupy public mineral lands should be liberally construed. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

87. Where section 2336 does not apply by reason of a conveyance by the locator to his grantee of a portion of the claim, the ordinary rule governing grants must of necessity apply, and if the intersection of the vein takes place on the part of the claim conveyed, the grantee takes all the mineral at the space of intersection. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98; S. C., 96 Cal. 33; 30 Pac. Rep. 839.

5. *General.*

88. The general policy of the British, Spanish and Mexican governments relative to the reservation of mines in grants, discussed. Moore v. Smaw and Fremont v. Flower, 17 Cal. 199; 12 Mor. Min. Rep. 418.

89. A patent from the United States for land in California, issued upon confirmation of claims held under grants by the Mexican government, invests the patentee with the ownership of the precious metals which the land may contain. Moore v. Smaw, 17 Cal. 199; 12 Mor. Min. Rep. 418; Fremont v. Flower, 17 Cal. 199 (1860–61).

90. Patents in confirmation of Mexican grants invest the patentee with ownership of precious metals. Ah He v. Crippen, 19 Cal. 491; 10 Mor. Min. Rep. 367; Moore v. Smaw, 17 Cal. 199; 12 Mor. Min. Rep. 418 (1860–61).

91. The location of a mining claim on land within the limits of a Mexican grant *sub judice* confers no right if the grant be afterward confirmed. Manning v. San Jacinto Tin Co., 7 Sawy. 418.

92. A claimant under a Mexican grant must protect his rights by filing an adverse claim and instituting suit thereon. If he fails so to do he can appear only as a protestant, and as such has no right of appeal from a decision of the General Land Office dismissing his protest. McGarrahan v. New Idria M. Co., 3 L. D. 422.

93. Lands within the claimed limits of a Mexican grant, as to which confirmation proceedings are pending, are not subject to location and entry under the mineral land laws. Com'r to H. E. Travis, Feb. 8, 1894.

94. Nor may such lands be embraced in a mineral survey. Com'r to Surveyor General of Arizona, Jan. 15, 1892.

95. Lands within a confirmed Mexican grant are not public lands, and are not subject to acquisition under the mineral land laws. Com'r to Charles Lanzendorfer, July 7, 1893.

96. The Statute of Limitations does not commence to run against parties claiming

under a patent confirming a Mexican grant until the date of the issuance of patent, if the adverse claimant does not show the existence of a perfect grant prior to the issuance of patent. Tuffree v. Polhemus, 108 Cal. 670.

97. The official survey of a Mexican grant, after confirmation by Congress, is conclusive on collateral attack. Colorado Fuel Co. v. Maxwell Land Grant Co., 43 Pac. Rep. 916 (Colo.).

98. The selection and location of lands known to be mineral might be properly vacated; but the right to select other land in lieu thereof would be barred unless made within the statutory period. Baca Float No. 3, 14 C. L. O. 133.

99. Legislative grants are to be construed against the grantee. Dubuque & Pacific R. R. Co v. Litchfield, 23 How. 66–68; Rice v. Railroad Co., 1 Black, 358; Leavenworth, etc. R. R. Co. v. United States, 92 U. S. 733–747; Missouri, etc. R. R. Co. v. Kansas Pacific R. R. Co., 97 U. S. 491–497; Hall v. Russell, 101 U. S. 503–509; Hamilton, etc. Co. v. Hamilton, 146 U. S. 258; Oregon Ry. & Nav. Co. v. Oregon Ry. Co., 130 U. S. 1. (Especially corporate powers under general statute.) Boteller v. Dominguez, 130 U. S. 238. (Spanish grants in California, Act of March 3, 1851, 9 Stat. 631.)

100. Grants by the United States of its public lands bounded by streams or other waters, made without reservation relative thereto, are to be construed, as to riparian rights, according to the law of the State in which the land is situate. Hardin v. Jordan, 140 U. S. 371.

101. The act of 1866 (sec. 2339, U. S. Rev. Stat.) had three objects: 1. Confirmation of existing water rights. 2. Grant of right of way over public lands for construction of flumes or canals for mining or manufacturing purposes. 3. Grant of right to occupants of public lands to sue for damages caused by construction of such flumes or canals. Hobart v. Ford, 6 Nev. 77; 15 Mor. Min. Rep. 236.

REPEAL PROVISIONS.

TITLE LXXIV.

SEC. 5595. The foregoing seventy-three titles embrace the statutes of the United States general and permanent in their nature, in force on the 1st day of December, one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of Congress, and the same shall be designated and cited as The Revised Statutes of the United States.

SEC. 5596. All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: *Provided*, That the incorporation into such revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local, or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last-named day no part of which are embraced in said revision, shall not be affected or changed by its enactment.

Although the original mining statutes may have had a larger or more limited application than those now in force, they were specifically repealed by section 5596, United States Revised Statutes, unless they were embraced in the revision of the statutes. Deffeback v. Hawke, 115 U. S. 392. (Citing United States v. Bowen, 100 U. S. 508.)

SEC. 5597. The repeal of the several acts embraced in said revision, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal, but all rights and liabilities under said acts shall continue, and may be enforced in the same manner, as if said repeal had not been made; nor shall said repeal, in any manner affect the right to any office, or change the term or tenure thereof.

SEC. 5598. All offenses committed, and all penalties or forfeitures incurred under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same manner and with the same effect, as if said repeal had not been made.

SEC. 5599. All acts of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures, embraced in said revision and covered by said repeal, shall not be affected thereby, but all suits, proceedings or prosecutions, whether civil or criminal, for causes arising, or acts done or committed prior to said repeal, may be commenced and prosecuted within the same time as if said repeal had not been made.

SEC. 5600. The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of the legislative construction is to be drawn by reason of the Title, under which any particular section is placed.

SEC. 5601. The enactment of the said revision is not to affect or repeal any act of Congress passed since the 1st day of December, one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from, or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith.

Approved June 22, 1874.

MISCELLANEOUS SUBJECTS.

The following miscellaneous subjects could not well be embraced under the subject-matter pertaining to the statutes without causing more or less confusion. Consequently, they have been arranged alphabetically for convenience.

AGENT—ATTORNEY.

1. A valid location may be made by one acting as agent for another. Gore v. McBrayer, 18 Cal. 582; 1 Mor. Min. Rep. 645; Morton v. Solambo M. Co., 26 Cal. 527; 4 Mor. Min. Rep. 463; Murley v. Ennis, 2 Colo. 300; 12 Mor. Min. Rep. 360; Kramer v. Settle, 1 Idaho, 485; 1 Mor. Min. Rep. 561; Schultz v. Keeler, 2 Idaho, 305; 13 Pac. Rep. 481; Dunlap v. Pattison, 42 Pac. Rep. 504.

2. A location may be made by an agent, and, in the absence of a contrary showing, a location purporting to be made by an agent for a principal will be presumed to be made with the assent of the principal. Gore v. McBrayer, 18 Cal. 582; 1 Mor. Min. Rep. 645.

3. A mining location may be made by an agent, who may, as agent, also make any necessary affidavits pertaining thereto. Dunlap v. Pattison, 42 Pac. Rep. 504.

4. An agent may locate a mining claim, but, unless specially authorized, cannot divest his principal of title so acquired. Gore v. McBrayer, 18 Cal. 582; 1 Mor. Min. Rep. 645 (1861).

5. The right of an attorney to compromise the rights of his client will not be recognized in the absence of specific authority. James v. Koons, 19 L. D. 266.

6. The acts required as evidence of possession of mining claims are those usually done. A miner may hold possession by his agents or servants. English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202; Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 668.

7. When A. locates for B. it is presumed that he has authority so to do. Rush v. French, 1 Ariz. 99; 25 Pac. Rep. 816.

8. A relocation by an agent for himself inures to his principal. Lockhart v. Rollins, 2 Idaho, 503; 21 Pac. Rep. 413.

9. A relocation by an agent of the claimant, for himself, questioned. Utah M. & Mfg. Co. v. Dickert & Myers Sulphur Co., 6 Utah, 183; 21 Pac. Rep. 1002.

10. A location made by an individual in his own name may be shown to have been made by him as agent of another. Sold Again Lode, 20 L. D. 58.

11. Where the record shows the survey of a mining claim to have been based upon an amended location made by a stranger in his own name, the applicant for patent may show, by affidavits, that such stranger, in making the amended location, acted as the agent for the applicant. Gray Copper Lode, 18 L. D. 536.

12. An agent, after agency ceases, may acquire an interest in a conflicting claim. Cons. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

13. An agent may not defeat the rights of his principal by relocation, and if he does so he will be declared trustee under the relocation for his principal. Lockhart v. Rollins, 2 Idaho, 503; 21 Pac. Rep. 413.

14. If A. locates a claim in the name of B. and holds and works the same, the law presumes it to be done by A. as agent of B., and A. can maintain no action for the claim in his own name. Van Valkenburg v. Huff, 1 Nev. 142; 9 Mor. Min. Rep. 467.

15. A location made by A. in the name of B. constitutes B. the legal owner, and A. cannot compel B., as trustee, to convey to him. Moore v. Hammerstag, 109 Cal. 122; 41 Pac. Rep. 805.

16. The affidavits required of an applicant for a mineral patent may not, under the act of January 22, 1880, be made by an agent if the applicant is a resident of, or, at date of

making proof, within the land district, even if the agent is the only one personally cognizant of the facts constituting compliance with the law. Rico Lode, 8 L. D. 223.

17. An agent who files an adverse claim must show his authority, and must swear to the adverse claim within the land district wherein the claim is situated. Circular May 9, 1882, 1 L. D. 685.

18. The failure of an agent who files an adverse claim, sworn to as agent, and on which suit is duly instituted, to furnish proof of agency at time of filing the adverse claim, will not warrant the allowance of entry upon the application against which the adverse claim is filed, and an entry so allowed will be canceled. Brown v. Bond, 11 L. D. 150.

19. Although an adverse claim was defective in that it was sworn to (before the act of April 26, 1882, 22 Stat. 49) by the agent of the adverse claimants, action will be suspended by the Land Department if suit has been instituted thereon. Samuel McMaster, 2 L. D. 706.

20. An agreement between the owner and a third person, whereby the third person is to work the claim with the privilege of buying and applying the value of his labor on the purchase price, no charge to be made against the owner if no sale is made, constitutes the third person the agent of the owner under the lien law. Eaman v. Bashford, 37 Pac. Rep. 24. Such third person is a lessee under lien laws. Stinson v. Hardy, 41 Pac. Rep. 116.

21. The affidavit of claimant, sworn to before his attorney as a notary public, will not be accepted by the Land Department. Werden v. Schlecht, 20 L. D. 523.

22. The register of a land office who acts as attorney for a mineral applicant for patent and charges more than his legal fees for services in the matter is guilty of extortion under section 5481, United States Revised Statutes. United States v. Waitz, 3 Sawy. 473; 4 Mor. Min. Rep. 205.

23. A register may not act as attorney in a case before the land office. United States v. Waitz, 3 Sawy. 473; 4 Mor. Min. Rep. 205.

24. An employee in the office of the United States Surveyor General is an employee of the General Land Office within the meaning of section 452, United States Revised Statutes, prohibiting officers, clerks or employees from acting as attorneys. Herbert McMicken, 11 L. D. 96.

25. A clerk in a local land office is an employee of the General Land Office within the meaning of section 452, United States Revised Statutes, prohibiting officers, clerks or employees from acting as attorneys. Sharritt v. Wood, 11 L. D. 25.

26. A coal declaratory statement and the affidavit required at date of purchase may not be made by an agent. J. W. Hallowell, 2 L. D. 735. (Affirmed by Secretary, May 23, 1884.)

27. Where an applicant to purchase coal lands under a declaratory statement alleges compliance with the law through his agent, and it appears that such agent is the real party in interest, the agent may be allowed to make entry as assignee of the declarant. Kerr v. Utah-Wyoming Improvement Co., 2 L. D. 727.

28. A coal declaratory statement by an agent of an association must be under oath, must show qualifications of the individuals comprising the association, and, if for more than three hundred and twenty acres, must show $5,000 worth of improvements to have been made upon the land. Johnson v. South Dakota, 17 L. D. 411.

29. Service of notice on an attorney is service on the claimant. Duncan v. Rand, 19 L. D. 355.

30. Every attorney before the local land office must, either at the time of entering his appearance for a claimant, or within thirty days thereafter, file written authority for such appearance, signed by said claimant or contestant. Circular, March 19, 1887, 14 C. L. O. 2.

31. An attorney in good standing, admitted to practice before the Department, is not required to file written authority to appear on behalf of his client. Dober v. Campbell (review), 18 L. D. 88.

32. An attorney desiring to practice before the Department of the Interior must qualify before entering his appearance. Regulations, 1 L. D. 113; Com'r to John Wedderburn, Sept. 15, 1892; Com'r to Lindley and Eickhoff, Sept. 28, 1893.

AGRICULTURAL CLAIM.

(See CHARACTER OF LAND and HEARING, pp. 347 and 421.)

1. A patent for agricultural lands does not pass title to known deposits of precious metals. Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

2. No title can be obtained under the pre-emption, homestead or town site laws to land known at the time of sale to be valuable for its minerals, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas. Deffeback v. Hawke, 115 U. S. 392; Sparks v. Pierce, 115 U. S. 408.

3. "Thus read they must be held, we think, merely to prohibit the passage of title under the provisions of the Town-Site laws, to mines of gold, silver, cinnabar or copper, which are known to exist, on the issue of the town site patent, and to mining claims and mining possessions, in respect to which such proceedings have been taken under the law or the customs of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The exceptions of mineral lands from pre-emption and settlement and from grants to States for universities and schools, for the construction of public buildings and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining States which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral' in the sense of this statute is applicable." Davis' Adm'r v. Weibbold, 139 U. S. 507. (Citing and approving Alford v. Barnum, 45 Cal. 482; 10 Mor. Min. Rep. 422; Merrill v. Dixon, 15 Nev. 401; Cowell v. Lammers, 10 Sawy. 246; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy, 645; 16 Fed. Rep. 848; United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486; Dughi v. Harkins, 2 L. D. 721; Cleghorn v. Bird, 4 L. D. 478; Samuel W. Spong, 5 L. D. 193; Com'rs of Kings County v. Alexander, 5 L. D. 126; Magalia G. M. Co. v. Ferguson, 6 L. D. 218; Nicholas Abercrombie, 6 L. D. 393; John Downs, 7 L. D. 71; Cutting v. Reininghaus, 7 L. D. 265; Creswell M. Co. v. Johnson, 8 L. D. 440; Thomas J. Laney, 9 L. D. 83.

4. It is not sufficient to constitute "known mines" of coal, within the meaning of the statute, that there should be merely indications of coal beds or coal fields, of greater or less extent and value, as shown by outcroppings. Colorado Coal & Iron Co. v. United States, 126 U. S. 307.

5. "To constitute the exemption contemplated by the pre-emption act under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. * * * A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale." Colorado Coal & Iron Co. v. United States, 128 U. S. 307.

6. To be excepted from an agricultural entry, land must be known, at the time of the entry, "to be so valuable for their minerals as to justify expenditure for their extracting." Davis' Adm'r v. Weibbold, 139 U. S. 507; S. C., 7 Mont. 107.

7. The fact that land contains some gold will not except it from entry, under the agricultural land laws, if it is more valuable for agriculture than for mining purposes. United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486.

8. "The fact that there may be small quantities of gold in it, not in sufficient quantities to warrant miners to work it, would not prevent the homestead claimant from taking it as agricultural land." Etling v. Potter, 17 L. D. 424.

9. Where land was returned as agricultural in character and is claimed as such, the question "is not whether the land is mineral in character, but whether the mineral character is such as to make the land more valuable for mining than for agricultural purposes or whether the mineral character is shown to be

such as to warrant the conclusion that the minerals might be obtained with the aid of known means and appliances in sufficient quantities and of such values as to make it more valuable for mining than for agricultural purposes." Creswell M. Co. v. Johnson, 8 L. D. 440.

10. A mining location in Alabama made prior to March 3, 1883, and properly maintained, entitles the locator to make entry thereof on due compliance with law, notwithstanding the provision of the act of that date (22 Stat. 487), providing that lands in Alabama should be disposed of only as agricultural lands. Cordell Placer, 4 L. D. 476.

11. Land, to be excepted from agricultural entry as mineral, must be shown to be such as a *present* fact. Scott v. Sheldon, 15 L. D. 361.

12. Though land, to be excepted from a pre-emption entry as mineral, must have been known to be such at date of pre-emption entry (Harnish v. Wallace, 13 L. D. 108), it need not necessarily have been known to the pre-emption entryman, if its mineral character was a matter of general knowledge. Tinkham v. McCaffrey, 13 L. D. 517.

13. Where land is returned as agricultural in character and is so claimed, the burden of proof is upon one alleging its mineral character. Hooper v. Ferguson, 2 L. D. 712; Dughi v. Harkins, 2 L. D. 721; Caledonia M. Co. v. Rowen, 2 L. D. 714.

14. Where land returned as non-mineral is claimed under the agricultural law, the burden is upon one alleging its mineral character to show that it is mineral in character as a present fact, not that adjoining tracts are such. Magalia Gold M. Co. v. Ferguson, 6 L. D. 218.

15. The burden of proving the land more valuable for mining than for agricultural purposes as a fact is upon one attacking an original homestead entry of land returned by the United States Surveyor General as agricultural. Winters v. Bliss, 14 L. D. 59.

16. A contestant against a pre-emption entry who alleges the land to have been known to be mineral at date of pre-emption entry has the burden of proving that it was more valuable for mining than for agricultural purposes. Tinkham v. McCaffrey, 13 L. D. 517.

17. A preference right of entry will be accorded an agricultural contestant who secures the cancellation of a mineral entry because of the non-mineral character of the land. Dornen v. Vaughn, 16 L. D. 8.

18. Land chiefly valuable for deposits of building stone of fine quality is mineral in character and not subject to entry under the agricultural land laws. McGlenn v. Wienbroeer, 15 L. D. 370.

19. "When an application to enter agricultural land is made, if the locators of mining claims on the land have any objections, they must be vigilant in presenting them. The rules and regulations provide ample means for this purpose, and if the remedies are not pursued, the mineral claimants will not be heard to complain." Secretary Smith to General Land Office, March 11, 1896, *In re* Caribou Lode, Glenwood Springs, Colo., Land District.

20. Where a mill site is located upon land claimed by a pre-emptor, the relative rights of the parties are to be determined by priority of possession. Sierra Grande M. Co. v. Crawford, 11 L. D. 338.

21. Prior to the act of August 4, 1892 (27 Stat. 348), a placer location could not be legally made for land containing only deposits of glass-sand and building stone, and the act of that date could not validate such a location previously made in the face of an intervening homestead claim. Florence D. Delaney, 17 L. D. 120.

22. Where, since August 4, 1892 (27 Stat. 348), land is claimed by one person under the settlement laws and by another under the mineral laws, the land being chiefly valuable for building stone, the sole question to be decided between the claimants is one of priority. Clark v. Ervin, 16 L. D. 122.

23. Land containing deposits of stone suitable for the manufacture of lime may be entered either under the placer laws or under the "timber and stone act" of June 3, 1878 (20 Stat. 89), and, when claimed under both laws, the rights of contesting claimants must be decided by priority of assertion of a legal claim. Shepherd v. Bird, 17 L. D. 82.

24. A placer location of land containing stone was made in 1889. A pre-emption declaratory statement was filed by a settler the same year. In 1891 deposits of fire clay were alleged to have been discovered. *Held*, that as the placer location was based upon a discovery of building stone without legal war-

rant, the subsequent discovery of fire clay would not defeat the agricultural claim. (NOTE.—The real reason for the decision appears to have been failure to prove the existence of valuable deposits of fire clay.) Clark v. Ervin, 17 L. D. 550.

25. Where a lode claim and mill site are located, and later the land covered thereby is entered under the homestead law and proved to be non-mineral, the mineral claimant who had erected a mill on the mill site has the better right thereto, though he must thereafter hold it under the second clause of section 2337, United States Revised Statutes. Adams v. Simmons, 16 L. D. 181.

26. A coal claimant, contesting an original homestead entry, must show the land to be valuable for coal deposits by actual production of the coal. Jones v. Driver, 14 L. D. 514.

27. Where it is alleged that land covered by an agricultural claim contains coal, the inquiry should be whether any forty-acre subdivision, taken as an entirety, is more valuable for coal than for agricultural purposes. A part of such a subdivision may not be segregated as valuable for coal. Mitchell v. Brown, 3 L. D. 65.

28. To be excepted from a final homestead entry as mineral, land must have been known at date of such entry to be mineral in character and more valuable therefor than for agricultural purposes. Nicholas Abercrombie, 6 L. D. 398.

29. To defeat a final homestead entry, a mineral contestant must show that at date of such entry the land was known to be more valuable for mining than for agricultural purposes. Creswell M. Co. v. Johnson, 8 L. D. 440.

30. The discovery of the mineral character of the land covered by a homestead claim at any time prior to final homestead entry will defeat the same. Dickinson v. Capen, 14 L. D. 426; Jones v. Driver, 14 L. D. 514.

31. Land known to contain mineral in such quantity as will justify expenditure to obtain it, at date of a final homestead entry, may not be patented to the homestead claimant. Departmental decision of May 20, 1896, *In re* Porter v. Scannell.

32. The character of land (whether mineral or non-mineral), embraced in a homestead claim may be questioned up to the date of final entry. A discovery of its mineral character between submission of defective proof and date of final entry will defeat the homestead claim. Spratt v. Edwards, 15 L. D. 290.

33. The known character of land at the date of final homestead entry determines whether or not it should be excluded from the homestead claim because of its mineral character, the discovery of mineral subsequent to such final entry being immaterial. Rea v. Stephenson, 15 L. D. 37.

34. To be excepted from a pre-emption entry as mineral, land must be known to be such at date of the agricultural entry. A discovery of mineral after pre-emption entry of the land would not defeat the pre-emption entry. Harnish v. Wallace, 13 L. D. 108.

35. "A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not 'known mines,' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act, cannot be successfully assailed." Colorado Coal & Iron Co. v. United States, 123 U. S. 307.

36. To be reserved from entry under the agriculture land laws and from patent issued under said laws, land must have been *known* at the time of sale (entry) to be valuable for its minerals. A discovery of its mineral character subsequent to that date cannot affect the title. Deffeback v. Hawke, 115 U. S. 392.

37. A mineral application should not be received for land covered by a homestead entry, but upon its tender a hearing should be ordered to determine the character of the land. (In this case an erroneously filed application was allowed to stand pending such a hearing.) Hooper v. Ferguson, 2 L. D. 712.

38. Alabama lands returned as valuable for coal prior to the act of March 3, 1883 (22 Stat. 487), are not subject to homestead entry until offered at public sale. Alice Jordon, 7 L. D. 461; Nathaniel Banks, 7 L. D. 512; 8 L. D. 532; J. C. Henley, 9 L. D. 178.

39. Lands in Florida claimed prior to April 1, 1890, under the homestead or preemption laws, and not known to be valuable for phosphate deposits at date of such claim, may be entered under such laws notwithstanding a subsequent discovery of such deposits. Act of Oct. 1, 1890 (26 Stat. 663). Gary v. Todd, 18 L. D. 58.

40. Where an agricultural entry is shown to embrace a valid mining claim, the agricultural claimant must have a survey made at his expense under the direction of the Surveyor General, segregating the mineral from the agricultural land. Darragh v. Holdman, 11 L. D. 409.

41. The owner of an unsurveyed mining claim in conflict with an agricultural entry, which the Land Department holds should be excluded from the agricultural entry, must have an official survey of his claim made. Winters v. Bliss, 14 L. D. 59.

42. Where upon a contest it is decided that the land in conflict between an agricultural entry and an unsurveyed mining claim is mineral in character, a segregation survey must be made at the expense of the mineral claimant. Creswell M. Co. v. Johnson, 8 L. D. 440.

43. A survey to segregate agricultural land from a mining claim may be made at the expense of an agricultural claimant desirous of entering the land. Walter Bond, 18 L. D. 418.

44. An agricultural claimant who relinquishes the ground in conflict with an unsurveyed mining claim must have a survey made segregating such mining claim from his agricultural claim. Departmental decision of June 13, 1896, *In re* Arthur Chambers.

45. A lode claim divided into two noncontiguous tracts by land patented as agricultural in character can be entered only as to one of such tracts. Departmental decision of March 31, 1896, *In re* George H. Hewitt.

46. The survey of a mining claim must not be extended into an excluded agricultural claim. Bi-metallic M. Co., 15 L. D. 309.

47. Where an agricultural entry as originally made covers contiguous tracts, it may be allowed to stand although by a subsequent segregation of mineral land the land remaining consists of non-contiguous tracts. Lannon v. Pinkston, 9 L. D. 143.

48. The return of lands as saline is not conclusive of their character, and if disproven they are subject to agricultural entry. Cole v. Markley, 2 L. D. 847.

49. A location of a mining claim, where the entry therefor is canceled because of the non-mineral character of the land, may not be made the basis of a settlement claim to the same land. McIntyre v. Yokum, 16 L. D. 62.

50. A mineral entry of lands covered by a cash entry may be allowed to stand where the cash entry has been canceled. Dobbs Placer, 1 L. D. 565.

51. A coal declaratory statement may not be filed for land covered by a homestead entry, and if so filed, and thereafter the homestead entry is canceled and another party then files a coal declaratory statement, such other party is prior in right, being the first to make a legal filing. Bullard v. Flanagan, 11 L. D. 515.

52. A lode claimant has no right to follow his lode on its dip into an agricultural claim of which final entry had been made prior to the location of the mining claim. Colorado Central Cons. M. Co. v. Turck, 50 Fed. Rep. 888; 4 U. S. App. 290; 12 U. S. App. 85; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 348; Amador-Medean G. M. Co. v. South Spring Hill G. M. Co., 13 Sawy. 523; 36 Fed. Rep. 668.

ALASKA MINERAL LANDS.

AN ACT providing a civil government for Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * * *

SEC. 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land office, and the clerk provided for by this act shall be ex officio receiver of public moneys and the marshal provided for by this act shall be ex officio surveyor-general of said district and the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: *Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now

claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further*, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid: *And provided also*, That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

* * * * * * * * *

Approved May 17, 1884. (23 Stat. 24.)

PARAGRAPH 96 OF THE MINING REGULATIONS.

96. The administration of the mining laws as prescribed by these regulations will be, so far as applicable, adopted for, and extended to Alaska.

(1) The *ex-officio* register, receiver, and surveyor-general, while acting as such, and their clerks and deputy surveyors, will be deemed subject to the laws and regulations governing the official conduct and responsibilities of similar officers and persons under general statutes of the United States.

(2) The Commissioner of the General Land Office will exercise the same general supervision over the execution of the laws as are or may be exercised by him in other mineral districts.

1. The act of May 17, 1884 (23 Stat. 24, ch. 53, sec. 8), protects possessory claims to mines in Alaska, theretofore initiated, though not based upon a compliance with all the provisions of the United States laws relative to the location of a mining claim. Bennett v. Harkrader, 158 U. S. 441.

2. A location notice, defective in that it fails to describe the claim with particularity, may, if connected with the location of the claim by evidence, be admitted for the purpose of showing the date of the initiation of a mining claim in Alaska. Bennett v. Harkrader, 158 U. S. 441.

3. Natives of Alaska are not Indians. John Brady, 19 L. D. 323.

BOARD OF EQUITABLE ADJUDICATION.

1. A mineral entry may be referred to the Board of Equitable Adjudication, where posting of plat and notice of application for patent was not made on the claim owing to inaccessibility and danger of snow slides, but in a conspicuous place on the adjoining claim. Rowena Lode, 7 L. D. 477.

2. An entry of a lode and mill site, defective in that notice of application for patent was not posted upon the mill site, may be referred to the Board of Equitable Adjudication. New York Lode & Mill Site, 5 L. D. 518. (Overruling John W. Bailey & Grand View M. & Sm. Co., 3 L. D. 386.)

3. Where mineral claimants have shown due compliance with the law and regulations, except in the matter of furnishing proof of posting, the entry may be referred to the Board of Equitable Adjudication after new advertisement, posting, and proof thereof. Cornell Lode, 6 L. D. 717.

4. A mineral entry may be referred for confirmation to the Board of Equitable Adjudication, where the *locus* of the claim was not shown in the published notice by a line connecting the claim with the public surveys. Silver King Quartz Mine, 11 L. D. 234.

5. Where the published notice of application for patent contains a slight error in the connection showing the *locus* of the claim, the entry may be referred to the Board of Equitable Adjudication. Alabama Quartz Mine, 15 L. D. 563.

6. Where by a typographical error the line connecting the claim with a public survey corner was published as 2,552.2 feet in length, instead of 2,252.2 feet, the mineral entry may be referred to the Board of Equitable Adjudication. Newport Lode, 6 L. D. 546.

7. Publication of a notice of a mineral application for patent in a weekly paper requires ten insertions, but where only nine were made, in accordance with the former practice of the Department, the entry may be referred to the Board of Equitable Adjudication for confirmation in the absence of any adverse rights. Oro Placer, 11 L. D. 457.

8. Where by error in the survey of a mining claim the line connecting the claim was so erroneous as to place the claim about half a mile from its true position, it was held that

the mineral entry should be referred to the Board of Equitable Adjudication without requiring republication of notice of application. Buena Vista Lode, 6 L. D. 646; Veta Grande Lode, 6 L. D. 718.

9. A notice of application for a mineral patent that fails to connect the claim with the public surveys or a United States mineral monument is insufficient, and an entry allowed on such notice may not be referred to the Board of Equitable Adjudication in the presence of a protest of persons alleging adverse claims, but republication of notice will be required. Nil Desperandum Placer, 10 L. D. 198.

10. Where the notices of application for patent were sufficiently definite in the matter of description of the claim to cause an adverse claim to be filed, republication of notice will not be required because of an error in the survey of ten degrees in the course and three chains in the length of the line connecting the survey of the claim with a corner of the public surveys, but the entry may be referred to the Board of Equitable Adjudication. Walter C. Childs, 10 L. D. 178.

11. Any defect in the published notice of application for a mineral patent is chargeable to the register, whose duty it is to prepare and publish the same, and an entry may be referred to the Board of Equitable Adjudication where such notice is defective in failing to connect the claim with a corner of the public surveys or a United States mineral monument. Mimbres M. Co., 8 L. D. 457.

12. Where, on a contest between a mill site claimant and a lode claimant, the judgment of the General Land Office was that the land in conflict is mineral in character and that the lode claimant must give new notice of application for patent, the lode claimant may not allow said decision to become final, and then, by moving the reference of his entry to the Board of Equitable Adjudication, attempt indirectly to evade that portion of the decision adverse to him while claiming its finality as against the contestant. Oscar Waller, 22 L. D. 318.

13. A protestant without interest does not have such an "adverse claim" to the land involved as will serve to defeat a reference of the entry to the Board of Equitable Adjudication, if it is otherwise subject to such disposition. Cooke v. Villa (review), 19 L. D. 442; Walker v. Snider (review), 19 L. D. 467.

14. No case with a defect which can be remedied is to be referred to the Board of Equitable Adjudication. (Commissioner's order of April 13, 1893.) Com'r to Sacramento Office, July 9, 1894, *In re* Central North Star Quartz Mine.

COAL.

I. THE STATUTES.
II. REGULATIONS.
III. DECISIONS.

I. THE STATUTES.*

TITLE XXXII, CHAPTER SIX.

MINERAL LANDS AND MINING RESOURCES.

Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road. 17 Stat. 607; sec. 2347, U. S. Rev. Stat.

Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements. 17 Stat. 607; sec. 2348, U. S. Rev. Stat.

All claims under the preceding section must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to

* Coal Circular issued by Land Department July 31, 1882.

the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three. 17 Stat. 607; sec. 2349, U. S. Rev. Stat.

The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant. 17 Stat. 607; sec. 2350, U. S. Rev. Stat.

In case of conflicting claims upon coal-lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections. 17 Stat. 607; sec. 2351, U. S. Rev. Stat.

Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper. 17 Stat. 607; sec. 2352, U. S. Rev. Stat.

II. Regulations.

Under the authority conferred by said section 2351 the following rules and regulations are issued for carrying into effect the provisions of said law:

1. Sale of coal-lands is provided for —

By ordinary *private entry* under section 2347.

By granting a *preference right* of purchase, based on priority of possession and improvement, under section 2348.

2. The land entered under either section must be *by legal subdivisions*, as made by the regular United States survey. Entry is confined to surveyed lands; to such as are vacant, not otherwise appropriated, reserved by competent authority, or containing valuable minerals other than coal.

3. Individuals and associations may purchase. If an individual he must be twenty-one years of age and a citizen of the United States, or have declared his intention to become such citizen.

4. If an association of persons each person must be qualified as above.

5. A person is not disqualified by the ownership of any quantity of other land, nor by having removed from his own land in the same State or Territory.

6. Any individual may enter by legal subdivisions as aforesaid any area not exceeding one hundred and sixty acres.

7. Any association may enter not to exceed three hundred and twenty acres.

8. Any association of not less than four persons, duly qualified, who shall have expended not less than $5,000 in working and improving any coal mine or mines, may enter under section 2348 not exceeding six hundred and forty acres, including such mining improvements.

9. One person can have the benefit of one entry or filing *only*. He is disqualified by having made such entry or filing alone or as a member of an association. No entry can be allowed an association which has in it a single person thus disqualified, as the law prohibits the entry or holding of more than one claim either by an individual or an association.

10. Lands that are sufficiently valuable for gold, silver, or copper to prevent their entry as agricultural lands cannot be entered as coal lands; and you will not allow any entry to be made under the above-named provisions of law of lands valuable for their deposits of said minerals.

11. The present rules relative to "hearings to establish the character of lands," contained in General Land Office regulations of October 31, 1881, issued under the mining laws, will, as far as applicable, govern your action in determining the character of lands sought to be entered as coal land.

12. The price per acre is $10 where the land is situated *more* than fifteen miles from any completed railroad, and $20 per acre where the land is *within* fifteen miles of such road. The price of the land, however, must be determined by its distance from a completed railroad at the date of payment and entry irrespective of the preference-right of entry.

13. When application is made to purchase coal-land at the rate of $10 per acre you will in all cases require satisfactory proof that the land applied for is, at date of entry, situated more than fifteen miles from any completed railroad. This proof may consist of the affidavit of the applicant, or that of his duly authorized agent, corroborated by the affidavit of some disinterested credible

party showing personal knowledge of the facts.

14. Where the land lies *partly within* fifteen miles of such road and in *part outside* such limit, the *maximum* price must be paid for all legal subdivisions the greater part of which lie within fifteen miles of such road.

15. The term "completed railroad" is held to mean one which is actually constructed on the face of the earth; and lands within fifteen miles of any point of a railroad so constructed will be held and disposed of at $20 per acre.

16. Any duly qualified person or association must be preferred as purchasers of those public lands on which they have opened and improved, or shall open and improve, any coal mine or mines, and which they shall have in actual possession.

17. Possession by agent is recognized as the possession of the principal. The clearest proof on the point of agency must, however, be required in every case, and a clearly-defined possession must be established.

18. The *opening and improving* of a coal mine, in order to confer a preference-right of purchase, must not be considered as a mere matter of form; the labor expended and improvements made must be such as to clearly indicate the good faith of the claimant.

19. These lands are intended to be sold, where there are adverse claimants therefor, to the party who, by substantial improvements, actual possession, and a reasonable industry, shows an intention to continue his development of the mines in preference to those who would purchase for speculative purposes only. With this view, you will require such proof of compliance with the law, when lands are applied for under section 2348 by adverse claimants as the circumstances of each case may justify.

20. In conflicts where improvements have been or shall hereafter be commenced, priority of possession and improvement shall govern the award when the law has been fully complied with by each party. A mere possession, however, without satisfactory improvements, will not secure the tract to the first occupant when a subsequent claimant shows his full compliance with the law.

21. After an entry has been allowed to one party, you will make no investigation concerning it at the instance of any person except on instructions from this office. You will, however, receive all affidavits concerning such case and forward the same to this office, accompanied by a statement of the facts as shown by your records.

22. Prior to entry it is competent for you to order an investigation, on sufficient grounds set forth under oath of a party in interest and substantiated by the affidavits of disinterested and credible witnesses.

MANNER OF OBTAINING TITLE.

23. When title is sought by *private entry* the party will himself make oath to the following application, which must be presented to the register:

"I, —— ——, hereby apply, under the provisions of the Revised Statutes of the United States relating to the sale of coal-lands of the United States, to purchase the —— quarter of section ——, in township ——, of range ——, in the district of lands subject to sale at the land office at ——, and containing —— acres: and I solemnly swear that no portion of said tract is in the possession of any other party; that I am twenty-one years of age, a citizen of the United States (or have declared my intention to become a citizen of the United States), and have never held nor purchased lands under said act, either as an individual or as a member of an association; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains large deposits of coal and is chiefly valuable therefor; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

"—— ——."

24. Thereupon the register if the tract is vacant will so certify to the receiver, stating the price, and the applicant or his duly authorized agent must then pay the amount of purchase money.

25. The receiver will then issue to the purchaser a duplicate receipt, and at the close of the month the register and receiver will make returns of the sale to the General Land Office, from whence, when the proceedings are found regular, a patent or complete title will be issued; and on surrender of the duplicate receipt such patent will be delivered, at the option of the patentee, either by the Commissioner at Washington or by the register at the district land office.

26. This disposition at private entry will be subject to any valid prior adverse right which may have attached to the same land, and which is protected by section 2348.

27. *Second.* When the application to purchase is based on a priority of possession, &c., as provided for in section 2348, the claimant must, when the township plat is on file in your office, file his declaratory statement for the tract claimed sixty days from and after the first day of his actual possession and improvement. Sixty days, exclusive of the first day of possession, &c., must be allowed.

28. The declaratory statement must be substantially as follows, to wit:

"I, —— ——, do solemnly swear that I am —— years of age, and a citizen of the United States (or have declared my intention to become a citizen of the United States), that I never have, either as an individual or as a member of an association, held or purchased any coal lands under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United

States, and I do hereby declare my intention to purchase, under the provisions aforesaid, the —— quarter of section ——, in township —— of range ——, of lands subject to sale at the district land office at ——, and that I came into possession of said tract on the —— day of ——, A. D. 18—, and have ever since remained in actual possession continuously; that I have located and opened a valuable mine of coal thereon; and have expended in labor and improvements on said mine the sum of —— dollars, the labor and improvements being as follows: (here describe the nature and character of the improvements) and I do furthermore solemnly swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; and that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God. —— ——."

29. When the township plat is not on file at date of claimant's first possession the declaratory statement must be filed within sixty days from the filing of such plat in your office.

30. One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment; but you will allow no party to make final proof and payment except on notice to all others who appear on your records as claimants to the same tract.

31. A party who otherwise complies with the law may enter *after* the expiration of said year, *provided* no valid adverse right shall have intervened. He postpones his entry beyond said year at his own risk, and the government cannot thereafter protect him against another who complies with the law, and the value of his improvements can have no weight in his favor.

32. Each claimant at the time of actual purchase must make affidavit as follows:

"I, —— ——, claiming under the provisions of the Revised Statutes of the United States relating to the sale of coal-lands of the United States, the right of purchase to the —— quarter of section ——, in township —— of range ——, subject to sale at ——, do solemnly swear that I have never had the right of purchase under the aforesaid provisions of law either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I have expended in developing coal mines on said tract in labor and improvements the sum of —— dollars, the nature of such improvements being as follows: —— —— ——; that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that the same is chiefly valuable for coal; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God. —— ——."

33. The application, declaratory statement, and the affidavit required at the time of actual purchase, the forms of which are given above under paragraphs 28, 28 and 32, may be sworn to before any officer authorized by law to administer oaths, but the authority of such officer must be properly shown.

34. Any party duly qualified under the law, *after* swearing to his application or declaratory statement, may, by a sufficient power of attorney duly executed under the laws of the State or Territory in which such party may then be residing, empower an agent to file with the register of the proper land office the application, declaratory statement, or affidavit required at the time of actual purchase, and also authorize him to make payment for and entry of the land in the name of such qualified party; and when such power of attorney shall have been filed in your office you will permit such agent to act thereunder as above indicated.

35. Where a claimant shows by affidavit that he is not personally acquainted with the character of the land, his duly authorized agent who possesses such knowledge may make the required affidavit as to its character; but whether this affidavit is made by principal or agent it must be corroborated by the affidavits of two disinterested and credible witnesses having knowledge of its character.

36. Nothing in these regulations shall be so construed as to prevent a party from proving his citizenship or age, or establishing the status of the lands sought to be entered, in accordance with ordinary rules of evidence; and any proof regularly introduced for that purpose that would be competent in a court or before a commissioner charged with the ascertainment of facts may be considered.

37. Assignments of the right to purchase will be recognized when properly executed. Proof and payment must be made, however, within the prescribed period, which dates from the first day of the possession of the assignor who initiated the claim.

38. The "Rules of Practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior," approved December 20, 1880, will, as far as applicable, govern all cases and proceedings arising under the sections of the Revised Statutes above quoted providing for the sale of coal lands of the United States.

39. You will report at the close of each month as "sales of coal lands" all filings and entries in separate abstracts, commencing with number *one* and thereafter proceeding consecutively in the order of their reception. Where a series of numbers has already been commenced by sale of coal-lands you will continue the same without change.

III. Decisions.

1. Coal is a mineral. Charles Norager, 10 C. L. O. 54; McKean v. Buell, Sickel's Min. Dec. 398.

2. Coal lands are mineral lands, and, as such, are excluded from pre-emption and homestead claims. Town Site of Coalville, 4 C. L. O. 46.

3. Coal lands are mineral lands, and are to be acquired only under laws specifically applicable thereto. Mullan v. United States, 118 U. S. 271. (Affirming United States v. Mullan, 7 Sawy. 466; 10 Fed. Rep. 785.)

4. Coal lands are not "mineral lands" within the meaning of the act of June 3, 1878, authorizing the cutting of timber on mineral lands in certain States. Instructions, 2 L. D. 827.

5. Lignite is coal. Com'r to Gus Finger, March 8, 1893.

6. The coal land laws are applicable to every variety of coal. Com'r to Bismarck Office, Sept. 25, 1880.

7. The act of March 3, 1873, providing for sale of coal lands, relates to lands containing any variety of coal, whether anthracite, bituminous, lignite or cannel. Sickel's Min. Dec. 397.

8. "To constitute the exemption contemplated by the pre-emption act under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. * * * A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale." Colorado Coal and Iron Co. v. United States, 123 U. S. 307.

9. It is not sufficient to constitute "known mines" of coal, within the meaning of the statute, that there should be merely indications of coal beds or coal fields, of greater or less extent and value, as shown by outcroppings. Colorado Coal and Iron Co. v. United States, 123 U. S. 307.

10. Land is mineral in character if it contains mineral (coal) in paying quantities, and the present remoteness of the land from lines of transportation is immaterial. Smith v. Buckley, 15 L. D. 321.

11. The mere proximity of land to veins of coal will not of itself stamp it as mineral land. John E. Williams, 11 L. D. 462; Scott v. Sheldon, 15 L. D. 361.

12. Land sought under the coal land laws must be shown to be most valuable therefor as a present fact from the actual production of coal, but not necessarily by actual development of coal on each forty-acre tract in the claim. Hamilton v. Anderson, 19 L. D. 168.

13. The fact that land contains a thick vein of coal does not stamp it as mineral in character, where it is shown that the coal cannot be profitably mined. Departmental decision of May 20, 1896, in case of Green v. Grumbler.

14. Proof that adjoining lands are coal is not sufficient. Commissioners of Kings County v. Alexander, 5 L. D. 126.

15. Proof must show actual production of mineral (coal). Commissioners of Kings County v. Alexander, 5 L. D. 126.

16. Proximity to a city does not affect the right to make entry of coal lands. Commissioners of Kings County v. Alexander, 5 L. D. 126.

17. The question is as to whether the forty acres, taken as a whole, are more valuable for coal than for agricultural purposes. Mitchell v. Brown, 3 L. D. 65.

18. A preference right of entry under the coal land law is dependent upon the opening and improvement of a coal mine on public land in the actual possession of the claimant. Walker v. Taylor, 23 L. D. 10.

19. An applicant to make entry of coal lands under section 2348, United States Revised Statutes, must be in actual possession of the land, and it is not sufficient to show a forcible ouster therefrom. James D. Negus, 11 L. D. 32.

20. A preference right to purchase coal land depends upon priority of possession and improvement, followed by proper filing and development. Bullard v. Flanagan, 11 L. D. 515.

21. "Section 2348, U. S. Rev. Stat., makes the opening and improving of a coal mine upon the public lands a condition precedent to the preference right of entry therein authorized." Departmental decision of July 1, 1896, *In re* Cummings v. Lessinger.

22. A coal declaratory statement may not be filed for land covered by a homestead entry, and if so filed and thereafter the homestead entry is canceled and another party then files a coal declaratory statement, such other party is prior in right, being the first to make a legal filing. Bullard v. Flanagan, 11 L. D. 515.

23. The second section of the act of May 14, 1880, is construed to apply to entries of coal lands. (Preference right to successful contestants.) F. D. Hobbs, 9 C. L. O. 195.

24. Coal lands are disposed of only by legal subdivisions. *Hence*, a coal claim should not be made the subject of a mineral survey. Com'r to Deputy R. E. Hurst, Dec. 27, 1892.

25. An entry is not required to be for lands in a compact body. Com'r to Cheyenne Office, Aug. 11, 1878, 1 C. L. O. 2.

26. A coal entry may not be made of non-contiguous tracts. C. P. Masterson, 7 L. D. 172; Kendall v. Hall, 12 L. D. 419.

27. Coal land must be entered by legal subdivisions. Mitchell v. Brown, 3 L. D. 65.

28. A coal land entry embracing non-contiguous tracts, made in good faith, and in accordance with the practice then existing, may be passed to patent as made, or so amended as to include contiguous tracts. C. P. Masterson (review), 7 L. D. 577.

29. Coal lands are properly the subject of public survey. Circular, July 15, 1878, 6 C. L. O. 140.

30. A coal declaratory statement cannot be filed for land until it has been surveyed and plat thereof filed in the local office. Helen M. Cameron, 10 L. D. 195. Charles Lyon, 20 L. D. 556, to same effect.

31. No rights (vested) can be acquired on unsurveyed coal lands. Com'r to W. L. Smith, May 18, 1891; Com'r to J. M. Dimpsey, Aug. 19, 1891; Com'r to J. M. Carey, Nov. 25, 1892; Com'r to John Sutherland, July 14, 1893.

32. A survey may be procured under the "special deposit" system by coal claimants. Circular, Aug. 7, 1895, 21 L. D. 83.

33. Married women may make coal entries in States where they are permitted to own and sell real estate, under certain conditions. Com'r to E. A. Brooke, April 15, 1893. *Contra*, Lily E. Nichols, 15 C. L. O. 255.

34. A coal entry must be made in good faith and not for the benefit of another. Brennan v. Hume, 10 L. D. 160.

35. The filing of a qualified coal party who sold to an assignee, qualified at date of entry, should not be canceled. Kerr v. Carleton, 10 C. L. O. 255.

36. A coal entry will not be allowed when it is sought to make the same for the benefit of one who has exhausted his right under the coal land laws. McGillicuddy v. Tompkins, 14 L. D. 633. *Contra*, United States v. Trinidad Coal & Coking Co., 37 Fed. Rep. 180. (Reversed, S. C., 137 U. S. 160.)

37. An entry of coal lands for one disqualified from making such entry is fraudulent. Adolph Peterson, 6 L. D. 371; McGillicuddy v. Tompkins, 14 L. D. 633; Conner v. Terry, 15 L. D. 310.

38. A coal entry is invalid if the land is sold by claimant before entry. Union Coal Co., 17 L. D. 351.

39. The matter of good faith under section 2351, United States Revised Statutes (coal land law), is a question of fact to be determined in each particular case in view of surrounding circumstances. Watkins v. Garner, 13 L. D. 414.

40. The sale of coal land between the dates of proof and entry is not conclusive proof of fraud. Durango Land & Coal Co., 18 L. D. 382.

41. A coal entry under section 2348, United States Revised Statutes, voidable for illegality in that it was made for the use and benefit of one other than the entryman, and that coal had not been found on the land, may be passed to patent for the benefit of a transferee, in view of the fact that the purchase-money could not be repaid because of the fraud of the entryman in submitting false proof. Gerard B. Allen, 8 L. D. 140.

42. An entry of coal lands by qualified stockholders is not invalid because some time

during litigation stock was owned by a disqualified person. Kerr v. Utah-Wyoming Improvement Co., 2 L. D. 727.

43. Where coal lands are entered by a corporation, every stockholder must be qualified at date of entry. The fact that one stockholder, who sold his stock prior to entry, was disqualified at date of application, is not cause for canceling the entry. Kerr v. Carleton, 10 C. L. O. 255.

44. The qualification of every member of an association is essential to the right of an association to make a coal entry. W. F. Hawes, 5 L. D. 224.

45. No member of a company shall be interested in other lands claimed or owned under the coal land laws at date of entry. Kerr v. Utah-Wyoming Improvement Co., 2 L. D. 727.

46. Coal entries made by qualified persons at the procurement of and for the benefit of an association are contrary to law and will be canceled. Adolph Peterson, 6 L. D. 871; Northern Pacific Coal Co., 7 L. D. 422; Elwood R. Stafford, 21 L. D. 300; Com'r to B. H. Dye, Sept. 21, 1891. *Contra*, United States v. Trinidad Coal & Coking Co., 37 Fed. Rep. 180. (Reversed, S. C., 137 U. S. 160.) Lipscomb v. Nichols, 6 Colo. 290.

47. A purchase of coal lands from the United States by one authorized so to do, even if for the benefit and at the expense of a corporation unable to make the purchase for itself, under an agreement by which the land is to be conveyed to the corporation on issuance of patent, is not illegal, as such a contract to convey is not prohibited by the statutes relative to the sale of coal lands. United States v. Trinidad Coal & Coking Co., 37 Fed. Rep. 180. (Reversed, S. C., 137 U. S. 160.)

48. A corporation, some of the stockholders of which had exhausted their rights under the coal land laws, procured various persons, individually qualified, to make entry of coal lands for the purpose of transferring title acquired by such entry to the corporation. *Held*, that the transaction was in violation of the law governing the disposal of public lands containing coal, and that patents so obtained were voidable for fraud in their procurement. United States v. Trinidad Coal & Coking Co., 137 U. S. 160. (Reversing S. C., 37 Fed. Rep. 180.)

49. A coal entry may be made by one in his own name for the benefit of another. Lipscomb v. Nichols, 6 Colo. 290.

50. A coal entry made by one who has parted with his interest in the land is not made for the benefit of the entryman and will be canceled. Union Coal Co., 17 L. D. 351.

51. If an association enters a less number of acres of coal land than they might have done, they cannot make a second entry because of such fact. James N. Kimball, 3 C. L. O. 50.

52. Such an entry is an abandonment of the rest of the land under the pre-emption law (identical in principle to the coal land law). Nix v. Allen, 112 U. S. 129.

53. Proof of $5,000 expenditure on six hundred and forty acres of coal land should be made by the company before entry. Johnson v. State of South Dakota, 17 L. D. 411; Com'r to F. H. Barkdall, Aug. 19, 1891.

54. "It seems clear that this proviso (to Sec. 2348, U. S. Rev. Stat.) means that where an association has expended $5,000 or more in working and improving a coal mine or mines, then, in consideration of such expenditure, the association may enter by legal subdivisions not to exceed six hundred and forty acres of land, including the legal subdivisions of the land on which the mining improvements are actually situated, irrespective of whether the land covered by the improvements is coal land or agricultural land." McWilliams v. Green River Coal Ass'n, 23 L. D. 127. (Citing Rucker v. Knisley, 14 L. D. 118; Hamilton v. Anderson, 19 L. D. 168.)

55. No person who has had the benefit of the coal land law can enter or hold other lands thereunder. James N. Kimball, 3 C. L. O. 50.

56. A party having relinquished an expired coal filing for a parcel of land is not allowed to make a second one for it, as that would be extending the time within which the declarant would be required to prove his rights and pay therefor beyond the time prescribed by section 2350 of the Revised Statutes. James M. Smith, 16 C. L. O. 112.

57. A second coal declaratory statement cannot be filed in the absence of a valid reason for failure to perfect title under the first. Albert Eiseman, 10 L. D. 539; Walter Dearden, 11 L. D. 351; Conner v. Terry, 15 L. D. 310; McKean v. Buell, Sickel's Min. Dec. 398.

58. A second coal filing for the same tract is not allowed to one who has failed to make proof and payment within the statutory period. Alfred Grunsfeld, 10 L. D. 508.

59. One who has had the benefit of one coal declaratory statement is disqualified from making another, even though the first filing was made in the name of another. James D. Negus, 11 L. D. 32.

60. A second filing is not prohibited where a party has never made a coal entry. J. E. Hutchings, 4 C. L. O. 142.

61. But one entry is allowed to a person or association under section 2350, United States Revised Statutes. Adolph Peterson, 6 L. D. 371; Gerard B. Allen, 8 L. D. 140; J. E. Hutchings, 4 C. L. O. 142.

62. A coal entry will not be allowed on a coal declaratory statement filed in the interest of a person other than the applicant. Conner v. Terry, 15 L. D. 310.

63. The coal land law does not prohibit the filing of more than one declaratory statement. John McMillan, 7 L. D. 181.

64. For good reasons the Land Department will expressly authorize the filing of a second coal declaratory statement, and where entry has been made, based on a second declaratory statement, the filing thereof may be authorized *nunc pro tunc*. John McMillan, 7 L. D. 181.

65. A coal entry may not be made embracing one tract taken as assignee of a preference right and the other in the individual right of the entryman. Charles S. Ludlam, 17 L. D. 22.

66. A person who has bought and sold a preference right under the coal land law is not thereby barred from making a coal entry. William H. McConnell, 18 L. D. 414.

67. A coal contestant who offers to pay costs of a hearing in his contest against a coal entry, and upon whose showing the entry is canceled, has a preference right of filing upon the land, even though the hearing prayed was never ordered. Garner v. Mulvane, 12 L. D. 386.

68. In determining the character of land alleged to be chiefly valuable for coal, if coal has been *actually* produced, the probable extent of the deposit may be shown by testimony of expert geologists and miners. Rucker v. Knisley, 14 L. D. 113.

69. In determining the value of land claimed to be valuable for coal, the fact that adjoining tracts are known to contain valuable deposits of coal may be considered in connection with the fact that coal has been discovered upon the land in question. Departmental decision of May 23, 1896, *In re* Seifred v. Minelli.

70. The coal or mineral character of land must be determined by actual production from mining on the tract, or by satisfactory evidence that coal or mineral exists in sufficient quantity to make the same more valuable for mining than for agriculture. Savage v. Boynton, 12 L. D. 612.

71. It is not necessary to show that coal has been developed on the various portions of a forty-acre subdivision claimed under the coal land law; if coal has been discovered the applicant is entitled to the whole of the forty-acre tract. State of Montana v. Buley, 23 L. D. 116.

72. The mere fact that there are surface indications of coal on public land will not of itself prevent the acquisition of title to the land under the pre-emption laws; nor will such a title be invalidated by the fact that after acquisition of such title the surface indications prove to be veins which can, by a change of circumstances, be profitably worked. Colorado Coal & Iron Co. v. United States, 123 U. S. 307.

73. Discovery on each subdivision of a coal claim is not necessary if the evidence goes to show presence of coal there. Hamilton v. Anderson, 19 L. D. 168.

74. The fact that a tract of land is surrounded by tracts covered by coal declaratory statements, and covered by one or more of them, is not sufficient ground for the rejection of pre-emption proof. In such a case personal service should be given to the declarants, in addition to the published notice thereof, and upon complaints, hearings should be ordered. Jose R. Archuleta, 15 C. L. O. 256.

75. Land covered by an actual entry is not subject to filing under the coal land law, but upon allegation that an agricultural entry covers coal land, the coal applicant may contest it. Crowell v. Blaine, 16 C. L. O. 112.

76. Coal discovered after pre-emption entry cannot affect the title. Nicholas Abercrombie, 6 L. D. 393.

77. In determining the right of a homestead claimant and a coal claimant the character of each forty-acre subdivision in controversy should be ascertained. Scott v. Sheldon, 15 L. D. 361.

78. The discovery that land is valuable for coal after final homestead entry will not reserve it from patenting under the homestead entry. Nicholas Abercrombie, 6 L. D. 393.

79. A coal claimant contesting an original homestead entry must show the land to be valuable for coal deposits by the actual production of coal. Jones v. Driver, 14 L. D. 514.

80. Where it is alleged that land covered by an agricultural claim contains coal, the inquiry should be whether any forty-acre subdivision taken as an entirety is more valuable for coal than for agricultural purposes. A part of such a subdivision may not be segregated as valuable for coal. Mitchell v. Brown, 3 L. D. 65.

81. Where the character of land embraced in a coal entry is in question, the character of each legal subdivision (of forty acres or fractional part thereof) should be determined. Scott v. Sheldon, 15 L. D. 588 (on review).

82. On submission of final proof under a coal declaratory statement, and the appearance of an adverse claimant under the coal land law who protests against the acceptance of the proof, the adverse claimant should not be required to submit testimony as a contestant if the proof offered is insufficient under the regulations. Ouimette v. O'Conner, 22 L. D. 538.

83. Coal lands formerly embraced within a military reservation, now abandoned, are not subject to homestead entry under the act of July 5, 1884 (23 Stat. 104), but must be entered under the coal land laws. Departmental decision of May 14, 1896, *In re* Coppinger v. United States.

84. The price of coal land, *i. e.*, whether $10 or $20 per acre, must be governed by the distance of the land from a completed railroad at date of *payment* and *entry*. Departmental decision of Sept. 17, 1881, Copp's Min. Lands, 345; Departmental decision of May 10, 1882, McLean & Nolan Coal Entry; Instructions, 1 L. D. 540; Frank Foster, 2 L. D. 730; Joseph L. Colton, 10 L. D. 422; Edward B. Largent, 13 L. D. 397; Oswald C. Mortson, 16 C. L. O. 52.

85. The configuration of ground does not affect the price of coal land. Frank Foster, 2 L. D. 730.

86. Sections 2348 and 2349, United States Revised Statutes, do not require that a coal mine must have been opened by the claimant at the time of filing a coal declaratory statement. Ouimette v. O'Conner, 22 L. D. 538.

87. Mere occupation and improvement confer no rights as against the United States, nor do they impair the power of Congress to dispose of the land as it may deem proper. Yosemite Valley Case, 15 Wall. 77; Kaweah Cooperative Colony, 12 L. D. 326.

88. An applicant for the preference right of purchase under section 2348, United States Revised Statutes, must be in actual possession of the land when he applies for such right, and the labor expended and improvements made must be such as to clearly indicate his good faith. James D. Negus, 11 L. D. 32.

89. On the relinquishment of a coal declaratory statement the improvements made by the declarant inure to the benefit of one asserting a valid adverse claim to the land under the coal land law at the date of such relinquishment. Ouimette v. O'Conner, 22 L. D. 538.

90. Priority will govern where coal land is claimed in good faith by two parties. Paire v. Markham, 21 L. D. 197.

91. A preference right of entry of coal lands set up to defeat a private cash entry thereof must be based upon actual *bona fide* occupation of the land by and for the benefit of the one claiming such right. McDaniel v. Bell, 9 L. D. 15.

92. Possession, labor and improvements by a lessee must, in the absence of bad faith, be held to inure to the benefit of the lessor. Com'r to Salt Lake City Office, Jan. 2, 1890.

93. Prior possession without filing will not avail as against an adverse claimant who has complied with the law. Lezeart v. Dunker, 4 L. D. 96.

94. Possession of one tenant in common or partner is possession of all. Com'r to Buffalo Office, Dec. 8, 1893.

95. Claimants must verify their declarations and applications by their oaths, and they cannot delegate that duty. They can act by an agent only in the matter of filing

said papers and making the necessary payments. White Oaks Improvement Co., 13 C. L. O. 159.

96. A coal applicant must make his declaratory statement and final affidavit himself. J. W. Hallowell, 2 L. D. 735; Secretary's affirmation, May 23, 1884.

97. Although the coal declaratory statement and affidavit required at time of purchase were made before the attorney of the claimant, the same is allowed (there being no adverse filing) notwithstanding regulations of July 31, 1882, to the contrary. J. W. Hallowell, 2 L. D. 735.

98. Failure to file a coal declaratory statement within sixty days from taking possession of the land, and to make entry within a year from the time allowed for such filing, renders the land subject to entry by any other person who has complied with the law. Brennan v. Hume, 10 L. D. 160.

99. A coal entry, allowed on a defective declaratory statement, may, in the absence of adverse claims, be referred to the Board of Equitable Adjudication, where a proper declaratory statement is subsequently filed. Anthracite Mesa Coal Co., 19 L. D. 18.

100. A coal declaratory statement by an agent of an association must be under oath, must show qualifications of the individuals comprising the association, and if for more than three hundred and twenty acres must show $5,000 worth of improvements to have been made upon the land. Johnson v. South Dakota, 17 L. D. 411.

101. A coal declaratory statement, and the affidavit required at date of purchase, may not be made by an agent. J. W. Hallowell, 2 L. D. 735. (Affirmed by Secretary, May 23, 1884.)

102. A coal declaratory statement should not be received while the land is covered by the existing homestead entry of another. Bullard v. Flanagan, 11 L. D. 515.

103. A coal declaratory statement will be rejected when the declarant fails to state that he has "located and opened a valuable mine." Com'r to Pueblo Office, June 7 and 10, 1890.

104. A coal declaratory statement offered during the pendency of a previous application to file made for the benefit of the same applicant, though in the name of another, confers no right as against an intervening adverse claim. James D. Negus, 11 L. D. 32.

105. Where two declaratory statements under the coal land law are filed for the same tract of land, a hearing will not be ordered until one of the parties applies to purchase the land. William C. Tomlins, 16 C. L. O. 135.

106. A coal filing appropriates the land and bars a subsequent application. Kerr v. Utah-Wyoming Improvement Co., 2 L. D. 727.

107. The declaratory statement of a coal claimant should be canceled at the expiration of the time allowed for purchase thereunder, after due notice. Alfred Grunsfeld, 10 L. D. 508.

108. The Department has no authority to extend the time for payment. Com'r to John L. Wilson, Dec. 16, 1893; Com'r to H. E. Pinney, Jan. 2, 1894; Com'r to S. B. Mallory, May 3, 1894.

109. The failure to file a coal declaratory statement within sixty days after date of actual possession, and to make payment for the land within one year from the expiration of the time allowed for such filing, renders the land subject to entry by another who has complied with the law. Brennan v. Hume, 10 L. D. 160.

110. Priority of right to purchase coal lands under section 2347, United States Revised Statutes, is lost, in face of an intervening adverse claim, by failure to file upon the lands within the time prescribed by law. Lezeart v. Dunker, 4 L. D. 96.

111. Failure to perfect a coal land entry during the statutory period defeats the right so to do in the presence of an intervening adverse claim. (Claimant one day late.) O'Gorman v. Mayfield, 19 L. D. 522.

112. The right to purchase land under a coal declaratory statement is not forfeited, in the absence of a valid adverse claim, by failure to make entry within the statutory period. Alfred Grunsfeld, 10 L. D. 508.

113. In case of fire destroying the original coal declaratory statement, another should be filed as nearly like the first as possible. The filing of one coal declaratory statement exhausts the claimant's right. He must pay for the land at the time required. He cannot file a new declaratory statement. Alfred Grunsfeld, 10 L. D. 508.

114. A coal declarant who has failed to purchase during the time allowed will not be given further protection under a second de-

claratory statement for the same land. Alfred Grunsfeld, 10 L. D. 508.

115. An agent may make certain proofs. (Coal.) J. W. Hallowell, 2 L. D. 735. (Affirmed by Secretary, May 23, 1884.)

116. A coal land application made by an agent may be made by claimant *nunc pro tunc*. J. W. Hallowell, 2 L. D. 735. (Affirmed May 23, 1884, by Secretary.)

117. Where an applicant to purchase coal lands under a declaratory statement alleges compliance with the law through his agent, and it appears that such agent is the real party in interest, the agent may be allowed to make entry as assignee of the declarant. Kerr v. Utah-Wyoming Improvement Co., 2 L. D. 727.

118. The requirements of the General Mineral Circular issued by the Land Department do not apply to entries under the coal land laws. W. H. Mosley, 6 L. D. 620.

119. A coal entry should not be canceled for failure to furnish proof not required by the Land Department regulations in force at the date of the entry. Durango Land & Coal Co., 18 L. D. 382.

120. What constitutes sufficient proof of citizenship in a coal entry. W. H. Moseley, 6 L. D. 620.

121. Rights acquired under the coal act of March 3, 1865 (13 Stat. 529), are assignable. Cresmon v. Union Pacific R. R. Co., 2 C. L. O. 67.

122. When parties have located or filed upon coal lands, they may transfer their rights. James N. Kimball, 3 C. L. O. 50.

123. Assignments under the coal land law to disqualified persons are not recogized. James N. Kimball, 3 C. L. O. 50.

124. A coal declaratory statement, which section 2348, United States Revised Statutes, provides may be filed by "any person or association of persons, severally qualified as above provided, who have opened and improved or shall hereafter open and improve any coal mine, or mines upon the public lands and shall be in actual possession of the same," may also be filed by one in possession who has purchased the possessory right and improvements of another. Swain v. Kearney, 22 L. D. 306.

125. The purchaser of improvements made by a prior claimant under a coal declaratory statement acquires no priority thereby, if a specific assignment of the preference right to purchase has not been made as provided in paragraph 37 of the Coal Regulations. Ouimette v. O'Conner, 22 L. D. 538.

126. The transferee of a coal entryman, prior to issuance of patent, takes no greater right than his grantor had, *i. e.*, an equitable title, and the entry is subject to cancellation by the Land Department just as though no transfer had been made. Scott v. Sheldon, 15 L. D. 588.

127. A company may enter as the assignee of a coal declarant. Kerr v. Utah-Wyoming Improvement Co., 2 L. D. 727.

128. One of the members of an association can assign his preference right to the other members without defeating their right to perfect title. Com'r to Evanston Office, Feb. 29, 1888, 14 C. L. O. 283.

129. Where, before survey of the land, a coal claimant locates a claim in his individual capacity and another adjoining claim as agent for a company, and it is shown by the government survey that the improvements made by said company are upon land claimed by the individual, such improvements inure to the benefit of his claim. Curtis v. Songer, 22 L. D. 11.

130. A patent issued upon a coal entry, which was made for land not claimed, through error of description, may be surrendered to the Land Department, the land reconveyed to the government, proof furnished of non-alienation of the land patented, and the patent may be canceled and a new patent issued after amendment of the entry. Richard Gill, 8 L. D. 303.

131. Proceedings to vacate a patent to coal lands may be taken by the United States, though the patent issued without fraud. United States v. Mullan, 7 Sawy. 466; 10 Fed. Rep. 785; 118 U. S. 271.

132. The United States may maintain a suit to vacate a listing or certification under a land grant if the land was known to be valuable for coal at the date the grant took effect. Mullan v. United States, 118 U. S. 271. (Affirming United States v. Mullan, 7 Sawy. 466; 10 Fed. Rep. 785.)

133. Suit to set aside a patent will not be advised by the Department in the absence of a specific showing of facts sufficient to justify such action. James D. Negus, 11 L. D. 32.

134. A coal entry may be amended after patent when the mistake was made by reason of the indistinct marks at section corners. Richard Gill, 8 L. D. 303.

135. A coal entry embracing eighty acres, of which but forty acres was included in the declaratory statement, the other being necessary to the working of the mine, may be allowed to stand where the entry is made in good faith. Charles H. Ackert, 17 L. D. 268.

136. A. assigns the preference right to one hundred and sixty acres to B., who relinquishes one hundred and twenty acres. He cannot make entry of forty acres under his preference right, together with forty acres, by private cash entry. Com'r to Montrose Office, Oct. 14, 1892.

137. The fact that certain coal entries were made with the knowledge of officials in the General Land Office will not estop the Department from passing on their legality when brought before it for action. Adolph Peterson, 6 L. D. 371.

138. An entry may be made by one who has theretofore filed a declaratory statement. William H. McConnell, 18 L. D. 414.

139. A coal entry may embrace land not covered by the declaratory statement. Charles H. Ackert, 17 L. D. 268. *Contra*, Charles S. Ludlam, 17 L. D. 22.

140. An entry will be disallowed if inconsistent with the original claim. W. F. Hawes, 5 L. D. 224.

141. Coal veins may not be followed beyond the exterior limits of the claim. Com'r. to M. H. Dunnell, 1 C. L. O. 34.

142. The coal land laws have not been extended to Alaska. Com'r to James McClaskey, Feb. 8, 1893.

143. Repayment of purchase money paid in making a coal entry will not be made where the entry has been canceled for fraud. D. A. Mulvane, 15 L. D. 146.

144. Certificates of deposits for surveys are not received in payment for coal lands. Robert Sprowl, 4 C. L. O. 116.

145. Where coal exists, timber needed in mines should not be cut for fuel. H. M. Gregg, 10 C. L. O. 172.

146. Coal lands are not subject to entry under the timber culture laws. Com'r to Samuel Landers, 5 C. L. O. 146.

147. Timber cut on coal lands — certain price accepted. Osborn Bros., 2 L. D. 728.

148. A coal declarant in possession may sue for the value of stone removed from his land. Johnston v. Harrington, 5 Wash. St. 78; 31 Pac. Rep. 316.

149. Coal lands cannot be included in a town site entry. Com'r to Alma Elridge, 1 C. L. O. 191.

150. A town site patent does not pass title to any coal veins. Town Site of Coalville, 4 C. L. O. 46.

151. Excepting clause is inserted in town site and coal patents when they conflict. Town Site of Coalville, 4 C. L. O. 46. But see Deffeback v. Hawke, 115 U. S. 392.

152. Coal and iron lands in Alabama are to be sold as agricultural lands, but must be first offered at public sale. Act March 3, 1883 (22 Stat. 487); Circular, 1 L. D. 655.

153. Alabama lands returned as valuable for coal prior to the act of March 3, 1883 (22 Stat. 487), are not subject to homestead entry until after they shall have been offered at public sale. Alice Jordan, 7 L. D. 461; Nathaniel Banks, 7 L. D. 512; 8 L. D. 532; J. C. Henley, 9 L. D. 178.

154. Land in Alabama offered after it was returned as valuable for coal, and prior to the passage of the act of March 3, 1883, is not subject to entry if it has not been offered at public sale since the passage of said act. Julius P. Knabe, 15 C. L. O. 265.

155. Lands in Alabama reported to the land office as valuable for coal prior to the act of March 3, 1883, which provides for offering such lands at public sale, are not subject to homestead entry, although the same may have been covered by homestead entries at the date of the act. In this case, however, the entry made subsequent to the passage of the act may be held suspended, subject to the offering contemplated by the act. David J. Davis, 15 C. L. O. 246.

156. Coal lands are excepted from State grants as mineral by the act of June 1, 1864 (13 Stat. 343). United States v. Mullan, 7 Sawy. 466; 10 Fed. Rep. 785; 118 U. S. 271.

157. School sections in a Territory containing coal are reserved from sale. Com'r to W. S. Foster, 1 C. L. O. 19.

158. Entries of coal land may be made on school sections in the Territories. Henry Wood, 2 L. D. 762.

159. School sections containing coal are subject to disposal as other coal and mineral lands. Charles Norager, 10 C. L. O. 54.

160. Sections 16 and 36 in Colorado, if they contain valuable deposits of coal, do not pass to the State under the act of March 3, 1875. Fox & Patterson, 4 C. L. O. 66.

161. Lands known to be valuable for coal are not subject to indemnity selection by the State of California for lands lost under its school land grant, and if a patent issues to the State for lands so known at date of issuance of patent, the United States may bring suit in equity to vacate the patent. Mullan v. United States, 118 U. S. 271.

162. Lands known to be valuable for coal at date of admission of the State did not inure under the grant of lands for school purposes. Application to file on such lands should be admitted, and, upon application to purchase, proceedings should be had in accordance with paragraph 2 of the circular relating to coal lands. John M. Ramey, 15 C. L. O. 194.

163. Land surveyed prior to the admission of a State, and known to contain coal at the date of such admission, does not pass under a grant of school lands to the State. State of Montana v. Buley, 23 L. D. 116.

164. Lands known to contain valuable deposits of coal at date of admission of Colorado as a State (August 1, 1876) do not pass under the act of March 3, 1875. A hearing may be ordered to determine the character of the tracts in dispute. John M. Burkhart, 15 C. L. O. 38.

165. Parties desiring to avail themselves of the pre-emption privilege of the coal land law by filing for lands in sections 16 and 36 are not required to give notice to the State at date of filing declaratory statements. Such notice should be given on application to purchase thereunder. The question of the character of the land, however, may be determined, and the rights of the State defined, at any time upon application by the State for a hearing under the circular approved May 2, 1887. Com'r to Pueblo Office, Oct. 25, 1888, 15 C. L. O. 230.

166. Applications to file coal declaratory statements may be received for sections 16 and 36, with opportunity accorded the State to show cause why they should not be allowed. State of Colorado, 7 L. D. 400. (This decision overruled.) See Abraham L. Miner, 9 L. D. 408.

167. A coal declaration for lands in sections 16 and 36 may be admitted without investigation into the character of the land. Investigations by the district officers, on their information and belief, into the character of the lands described in applications to file coal declarations, should not be ordered prior to purchase or application to make proof and entry. Silas A. Bowe, 15 C. L. O. 246.

168. Coal land filings for lands in sections 16 and 36 in the Territories are admissible, notwithstanding that they may have been returned by the Surveyor General as non-mineral. The words in the form for the declaration, "That I have located and opened a valuable mine of coal thereon," must either not be omitted from the declaration, or words of substantially the same meaning must be used therein. William B. Sterling, 15 C. L. O. 256.

169. All minerals except coal and iron are excepted from grants to railroads. William A. Arnold, 2 C. L. O. 131.

170. When parties were in the possession of and working a coal mine upon a railroad section prior to the definite location of the road, such land does not pass to the railroad under a grant similar in terms to that of the Union Pacific Railroad Company. Crismon v. U. P. R. R. Co., 2 C. L. O. 67. (Affirmed by Secretary, April 11, 1876.)

171. Odd sections in the Union Pacific Railroad granted limits containing coal pass under the grant. Com'r to Cheyenne Office, Aug. 11, 1873, 1 C. L. O. 2.

172. Claims under the donation act will be patented, although containing coal. Com'r to John Yoakum, March 28, 1874, 1 C. L. O. 3.

173. The act of August 30, 1890 (26 Stat. 371), limiting the acquisition of public lands to three hundred and twenty acres, does not apply to the entry of coal lands. See section 17 of the act approved March 3, 1891 (26 Stat. 1095).

CONVEYANCE.

(See TITLE, p. 198.)

1. A conveyance of a mining claim by a qualified locator to an alien does not operate as an abandonment of the claim, but the alien may hold the claim as against all but

the United States; and where the alienage of an applicant is set up by an adverse claimant, the declaration of intention to become a citizen, made by the applicant during the pendency of the adverse suit but before judgment, will render his title good so far as citizenship is concerned. Manuel v. Wulff, 152 U. S. 505. (Reversing S. C., 9 Mont. 279; 23 Pac. Rep. 723. Citing Governeur v. Robertson, 11 Wheat. 332; Osterman v. Baldwin, 6 Wall. 116; Man v. Huk, 8 L. D. 452; Ole Krogstad, 4 L. D. 564; Lord v. Perrin, 8 L. D. 536; Jackson v. Beach, 1 Johns. Cas. 399.)

2. A grantee of an alien locator who takes possession and does all the acts required by law to maintain a location has good possessory title, provided no adverse rights have intervened between the dates of location and of transfer. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

3. A transfer of a mining claim to an alien is an abandonment of the locator's right. Lee v. Justice M. Co., 29 Pac. Rep. 1020.

4. Whether or not a patent is broader or narrower than the law under which it issues, it conveys that which the law says shall be conveyed. Stark v. Starr, 6 Wall. 402; Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858; King v. Thomas, 12 Pac. Rep. 865.

5. An adverse claim may be prosecuted by one who has covenanted to convey the property, as he could not otherwise keep his covenant. Wolverton v. Nichols, 119 U. S. 485; 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309.

6. Mining claims held by possessory title are property in the fullest sense of the word, and may be sold, transferred, mortgaged and inherited, and a location made in accordance with law has the effect of a grant by the United States of the right of present and exclusive possession. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183; Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Noyes v. Mantle, 127 U. S. 348; 15 Mor. Min. Rep. 611; Manuel v. Wulff, 152 U. S. 505. (Reversing S. C., 9 Mont. 279; 23 Pac. Rep. 723.)

7. Mining claims are treated as real estate although held under conditions, and may be conveyed by deed and sold on execution, and descend to the heir. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 12 Mor. Min. Rep. 178; Atkinson v. Taylor, 7 Colo. 195; Atwood v. Fricot, 17 Cal. 38; 2 Mor. Min. Rep. 305; Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217.

8. In California, before 1860, oral transfers of mining claims were good. Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198; 9 Mor. Min. Rep. 457; King v. Randlett, 33 Cal. 321. But by the act of 1860 (Sess. Laws, page 175), affecting gold mines, and extended to all mines by act of 1863 (Sess. Laws, page 98), oral transfers, even though accompanied by change of possession, were declared null and void. This rule must be subject to well-known principles of equity. Patterson v. Keystone M. Co., 23 Cal. 576; 30 Cal. 360; Goller v. Fett, 30 Cal. 481; 11 Mor. Min. Rep. 171; Folger v. Coward, 35 Cal. 652; Melton v. Lambard, 51 Cal. 253; 14 Mor. Min. Rep. 695; Garthe v. Hart, 73 Cal. 541; 15 Pac. Rep. 93; 15 Mor. Min. Rep. 492.

9. Mining claims should be conveyed by deed, being realty granted by the United States under the mining laws. Hopkins v. Noyes, 4 Mont. 550; 2 Pac. Rep. 280; 15 Mor. Min. Rep. 287. *Contra*, Hardenbergh v. Bacon, 33 Cal. 331; Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198; 9 Mor. Min. Rep. 457; Gatewood v. McLaughlin, 23 Cal. 178; Patterson v. Keystone M. Co., 23 Cal. 576; Union Cons. M. Co. v. Taylor, 100 U. S. 37; 5 Mor. Min. Rep. 323.

10. A mining claim can, under the Statute of Frauds, be transferred only by operation of law or instrument in writing. Moore v. Hammerstag, 109 Cal. 122; 41 Pac. Rep. 805.

11. A verbal transfer followed by change of possession is valid if not in conflict with law. Lockhart v. Rollins, 2 Idaho, 503; 21 Pac. Rep. 413.

12. A locator's right to a lode can only be conveyed by deed. Murley v. Ennis, 2 Colo. 300; 12 Mor. Min. Rep. 360.

13. A deed to give constructive possession of the entire claim to one who enters thereunder must contain definite boundaries which can be located, marked and made known from the deed itself. Hess v. Winder, 30 Cal. 349 (1865); 12 Mor. Min. Rep. 217.

14. A deed, not giving boundaries, but referring to a location certificate, in which a full description is given, will extend the possession to the entire claim described in such location certificate. Harris v. Equator M. & Sm. Co., 3 McCrary, 14; 8 Fed. Rep. 863; 2 Colo. Law Rep. 63; 12 Mor. Min. Rep. 178.

15. A deed of mineral entries Nos. 1 and 2, lots 3 and 4, patented as the A. and B. claims, may, if such appears to have been the intent of the parties, be held to convey all of grantor's title to the A. and B. claims, even though the patent only covered parts thereof. Crescent M. Co. v. Wasatch M. Co., 19 Pac. Rep. 198; Jackson v. Dines, 13 Colo. 90; 21 Pac. Rep. 918.

16. A mining claim may be conveyed by name, reference being made to the location record. Carter v. Bacigalupi, 23 Pac. Rep. 361.

17. Where the dividing line between the original location of the mining claims has been disregarded by one who has become the owner of both of them, and he has sold and conveyed a portion thereof not purporting to be made in accordance with the lines of the claim of the previous location, but as a conveyance of a tract of mining ground, carved out of the entire tract by metes and bounds, the grantor is estopped by his deed from questioning the right of his grantee to all the gold found within the surface lines of the deed, irrespective of the depth below the surface at which it is found, and such grantee has title to the gold found at the place of intersection of two veins falling within the surface lines of the deed, irrespective of the depth below the surface at which it is found. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98; S. C., 96 Cal. 33; 30 Pac. Rep. 839.

18. The decision of the Department, *In re* Juniata Lode (13 L. D. 715), wherein the Department consented to accept a reconveyance of the part of a patented placer claim covered by a lode location, for the purpose of issuing patent for the lode claim without suit to vacate the placer patent, is not applicable where it is desired to allow a lode patentee to reconvey a tract for the purpose of giving an unpatented lode claim its discovery. Winter Lode, 22 L. D. 362.

19. If the owner of a lode claim within a patented town site secures a reconveyance of the conflict to the United States, he may show by affidavits the known existence of the lode at date of the town site entry, without going to a hearing for the purpose, as there could be no other party to such hearing. Com'r to Denver Office, July 10, 1896, *In re* Dump Lode.

20. Where the discovery and improvements are excluded from the entry of a mining claim, the entry will be canceled, unless it is shown that mineral has been discovered and the requisite expenditure made upon claimed ground. A reconveyance by another lode claimant of the patented excluded ground will not be accepted, in such a case, as reinvesting title to the same in the government for the purpose of patenting it with the claim last entered. Winter Lode, 22 L. D. 362.

21. A relinquishment of ground embraced in a mineral entry, made by the entryman, must be accompanied by an abstract showing title in the entryman at date of the execution of the relinquishment. Com'r to Pueblo Office, Sept. 30, 1895, *In re* Lookout Lode.

22. "The officers of the Land Department, being merely agents of the Government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservation of the officers of the Land Department, resting for their fitness only upon the judgment of those officers." Davis' Adm'r v. Weibbold, 139 U. S. 507; S. C., 7 Mont. 107. (Citing Deffeback v. Hawke, 115 U. S. 392.)

23. Land patents in actions at law are conclusive "of all matters of fact necessary to their issue, where the Department had jurisdiction to act upon such matters, and to determine them; but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale, or other disposition, or they had been reserved from sale, the Department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void, no matter with what seeming regularity the forms of law have been observed." Davis' Adm'r v. Weibbold, 139 U. S. 507; S. C., 7 Mont. 107.

24. A purchase of coal lands from the United States by one authorized so to do, even if for the benefit and at the expense of a corporation unable to make the purchase for itself, under an agreement by which the land is to be conveyed to the corporation on issuance of patent, is not illegal, as such a contract to convey is not prohibited by the statutes relative to the sale of coal lands. United States v. Trinidad Coal & Coking Co., 37 Fed. Rep. 180. (Reversed, S. C., 137 U. S. 160.)

25. When, between the dates of making mineral entry and issuance of patent, the entryman sells the claim, the grantee holds under the patent, which relates back to date of entry. Brown v. Warren, 16 Nev. 229.

26. The California statute prohibiting corporate officers from selling "mining ground" without the consent of the stockholders is held to include ditch and water rights appurtenant to the claim. McShane v. Carter, 22 Pac. Rep. 178. A deed under this statute must show the consent of the stockholders. Pekin M. & M. Co. v. Kennedy, 22 Pac. Rep. 679.

27. A locator who has sold his claim will not be heard, over the objection of his grantee, to impeach the validity of the location made by him and subsequently sold. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

28. Section 2336 was not intended to limit or define the rights of a person in mere possession of a tract of mining ground, where there is more than one vein, or to prescribe the effect of a conveyance by the locator of a claim of a portion of his location containing one of such veins. The objects of the statute were to supplement the provision of section 2322, and to prescribe rules under which different locations by different proprietors should be held, and to determine the rights of such proprietors in case of intersecting veins. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98; S. C., 96 Cal. 33; 30 Pac. Rep. 839.

29. Where section 2336 does not apply by reason of a conveyance by the locator to his grantee of a portion of the claim, the ordinary rule governing grants must of necessity apply, and if the intersection of the vein takes place on the part of the claim conveyed, the grantee takes all the mineral at the space of intersection. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98; S. C., 96 Cal. 33; 30 Pac. Rep. 839.

CO-OWNERS.

(See ABANDONMENT, FORFEITURE, p. 128.)

1. A tenant in common of a mining claim, holding under possessory title, is not bound to file an adverse claim against an application for patent to the claim filed by a co-owner. The statute contemplates the filing of an adverse by one setting up a title *against* the mining claim applied for, not by one claiming an interest *in* the claim. Turner v. Sawyer, 150 U. S. 578; Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816; Brundy v. Mayfield, 15 Mont. 201; 38 Pac. Rep. 1067.

2. A tenant in common of a mining claim who is not joined by his co-tenants in their application for patent must, to be recognized by the Land Department, file an adverse claim and proceed under section 2326, United States Revised Statutes. Mattingly v. Lewisohn, 8 Mont. 259; 19 Pac. Rep. 310; Grampian Lode, 1 L. D. 544; Lucy B. Hussey Lode, 5 L. D. 93; Monitor Lode, 18 L. D. 358.

3. A co-owner who makes a relocation in his own name to the injury of the rights of his co-owners holds such relocation in trust for his co-owners to the extent of their respective interests. Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816.

4. Where an applicant bases his right to a patent on a relocation, in the making of which he acted as a constructive trustee for the benefit of co-owners according to their respective interests in the original location, such co-owners are not obliged to adverse the application, but may have the applicant declared trustee. Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816.

5. One of several owners of a mining claim may relocate the same for himself after abandonment and forfeiture thereof. Strang v. Ryan, 46 Cal. 33; 1 Mor. Min. Rep. 48.

6. Where one of two tenants in common of a mining claim promises to perform the work necessary to prevent the claim from becoming subject to relocation, but fraudulently fails so to do and relocates the claim for himself, though he has the legal title, he may be declared constructive trustee under the relocation for his co-owner as to his interest. Saunders v. Mackey, 5 Mont. 523; 6 Pac. Rep. 361.

7. Where one tenant in common of a mining claim promises to see that the required

annual labor is performed, but through collusion with a third person fails to do so, and the claim is relocated by such third person, the relocator may be declared a constructive trustee for the defrauded owner. Doherty v. Morris, 11 Colo. 12; 16 Pac. Rep. 911.

8. One who locates a claim in the names of himself and others, even without their consent, makes such others co-owners with himself, and cannot deprive them of their interests by destroying the location notice and posting a new one omitting their names. Morton v. Solambo Copper M. Co., 26 Cal. 527; 4 Mor. Min. Rep. 463.

9. If the locator of a mining claim inserts in the location notice the names of others, they become tenants in common with the one making the location, even though they were not aware of the location. Chase v. Savage S. M. Co., 2 Nev. 9; 9 Mor. Min. Rep. 476.

10. A parol partition of a mining claim, if followed by exclusive possession of the several parcels, is doubtless valid; the parties cease to be tenants in common, and forever afterwards deal at arm's length. 420 M. Co. v. Bullion M. Co., 9 Nev. 240; 1 Mor. Min. Rep. 114; 3 Sawy. 634; 11 Mor. Min. Rep. 608.

11. Mining claims may be partitioned between co-tenants the same as other real property. Hughes v. Devlin, 23 Cal. 501; 12 Mor. Min. Rep. 251. (See PARTITION.)

12. The possession of one co-tenant is the possession of all. Union Cons. S. M. Co. v. Taylor, 100 U. S. 37; 5 Mor. Min. Rep. 323; Colman v. Clements, 23 Cal. 245; 5 Mor. Min. Rep. 247.

13. The possession of one tenant in common is not adverse to his co-tenants. Union Cons. S. M. Co. v. Taylor, 100 U. S. 37; 5 Mor. Min. Rep. 323.

14. The possession of a mining claim by one tenant in common is possession of all, unless it becomes adverse. Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188; 1 Mor. Min. Rep. 17.

15. The taking of hostile possession of a mining claim by one tenant in common and excluding the co-tenant is an ouster, from the date of which the Statute of Limitations begins to run in favor of the tenant so taking possession and against his co-tenant. 420 M. Co. v. Bullion M. Co., 3 Sawy. 634; 11 Mor. Min. Rep. 608; 9 Nev. 240; 1 Mor. Min. Rep. 114.

16. To give a person the right to procure, by forfeiture proceedings under section 2324, United States Revised Statutes, the interest of another in a mining claim held by possessory title, the two persons must not only be co-owners at date of the forfeiture notice, but during the year in which the work was done upon the claim. Turner v. Sawyer, 150 U. S. 578.

17. The regularity and legality of forfeiture proceedings against alleged delinquent co-owners, under section 2324, United States Revised Statutes, will not be questioned by the Land Department if such co-owners fail to protect their rights by filing an adverse claim under section 2326, United States Revised Statutes. Grampian Lode, 1 L. D. 544.

18. A co-owner who has been "advertised out" may show his compliance with the law in the matter of expenditures, and that there was in fact no forfeiture. Brundy v. Mayfield, 15 Mont. 201; 38 Pac. Rep. 1067.

19. The defendant in an adverse suit cannot defeat plaintiff's title by showing that a forfeiture notice given by plaintiff to co-owners was insufficient. That point may be raised only by the co-owners. Becker v. Pugh, 17 Colo. 243; 29 Pac. Rep. 178. (First trial, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304.)

20. A tenant in common may maintain an action for the recovery of a mining claim without joining his co-tenant. Morenhaut v. Wilson, 52 Cal. 263; 1 Mor. Min. Rep. 53; Weise v. Barker, 7 Colo. 178; 2 Pac. Rep. 919; 2 West Coast Rep. 108.

21. Tenants in common in a mine may join in an action to recover possession of all their undivided interests. Goller v. Fett, 30 Cal. 481; 11 Mor. Min. Rep. 171.

22. Co-tenants are presumed by law to own equal interests until the contrary is shown. Nippel v. Hammond, 4 Colo. 211.

23. Where a location is made by a citizen and an alien, and the alien thereafter declares his intention of becoming a citizen, the citizen cannot, by relocation, cut his co-owner out on the ground that the original location was void so far as the alien was concerned. Sever v. Gregovich, 16 Nev. 325.

24. The partnership which exists between co-owners or co-lessees who work a mining claim in common is a particular and limited one. Kahn v. Central Sm. Co., 102 U. S. 641; Bissell v. Foss, 114 U. S. 252; Skillman v. Lachman, 23 Cal. 198; Duryea v. Burt, 28 Cal. 569; Charles v. Eshleman, 5 Colo. 107; Manville v. Parks, 7 Colo. 128; 2 Pac. Rep. 212; 15 Mor. Min. Rep. 565; Meagher v. Reed, 24 Pac. Rep. 681; Lamar v. Hale, 79 Va. 147; Crawshaw v. Maule, 1 Swanst. 495; Fereday v. Wightwick, 1 Russ. & M. 45; Williams v. Attenborough, 1 Turn. & R. 70; Dickinson v. Valpy, 10 B. & C. 128; Rock on Mines, 574.

25. Tenants in common who unite to work a mining claim are for this purpose partners and may bind each other as such. Charles v. Eshleman, 5 Colo. 107; Manville v. Parks, 7 Colo. 128; 2 Pac. Rep. 212; 15 Mor. Min. Rep. 565; Skillman v. Lachman, 23 Cal. 198; Duryea v. Burt, 28 Cal. 569; Dougherty v. Creary, 30 Cal. 300; Settembre v. Putnam, 30 Cal. 493; Higgins v. Armstrong, 10 Pac. Rep. 232.

26. The owner of the majority interest may direct the working of a mining claim, but the owner of the minority interest may compel an accounting (Idaho). Hawkins v. Spokane Hydraulic M. Co., 28 Pac. Rep. 433; 33 Pac. Rep. 40.

27. One tenant in common of a mining claim may not work the claim, and thereby charge his co-tenant with a share of the expense. Brunswick v. Winter's Heirs, 5 Pac. Rep. 706; Rico Reduction & M. Co. v. Musgrave, 28 Pac. Rep. 458; Stuart v. Adams, 26 Pac. Rep. 970.

28. The interests of co-owners are subject to a lien for work done at the instance of one owner who is working the mining claim for all. Hurd v. Tompkins, 30 Pac. Rep. 247.

29. Tenants in common may be partners for the purpose of working the claim; but are not necessarily such for the purpose of selling the claim, and one has no concern in what another receives for his share. Harris v. Lloyd, 11 Mont. 390; 28 Pac. Rep. 736.

30. Co-tenants of a mining claim are partners for the purpose of working the claim, but may sell their interests to any one else, whereupon the grantee would become partner. First National Bank v. Bissell, 4 Fed. Rep. 694.

DESCRIPTION.

(See LOCATION, PATENT and ADVERSE, pp. 84, 260 and 284.)

1. If the record of the location certificate contains some description of the claim by reference to natural objects or permanent monuments, the sufficiency of such description should be left to the jury. Taylor v. Middleton, 67 Cal. 656; 8 Pac. Rep. 594; 15 Mor. Min. Rep. 284; Russell v. Chumasero, 4 Mont. 309; 1 Pac. Rep. 713; 15 Mor. Min. Rep. 508; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153. (See, also, 130 U. S. 291.) Flavin v. Mattingly, 8 Mont. 242; 19 Pac. Rep. 384; O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302; Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404. (See, also, 5 Mont. 600; 6 Pac. Rep. 66.) Gamer v. Glenn, 8 Mont. 371; 20 Pac. Rep. 654; Dillon v. Bayliss, 27 Pac. Rep. 725; Seider v. Lafave, 4 New Mex. 369; 20 Pac. Rep. 789; Seider v. Maxfield, 4 New Mex. 374; 20 Pac. Rep. 794. (Discussing the point and overruling Baxter Mtn. G. M. Co. v. Patterson, 3 New Mex. 179; 3 Pac. Rep. 741; 3 West Coast Rep. 77.)

2. A location certificate is inadmissible in evidence when it is obvious from a reading thereof that there could be no certain description therein of the claim located. Darger v. Le Sieur, 30 Pac. Rep. 363.

3. A description of a placer claim in the recorded notice of location, giving the names of the claim and of adjoining claims, the size and its situation in a certain canyon, was held to be sufficient. Grady v. Early, 18 Cal. 108; 12 Mor. Min. Rep. 104.

4. A notice of location was held sufficient which described the claim as "commencing at a young black oak tree, about 400 feet northerly of an old cross-cut or drift, in the ravine; thence running southeasterly 1500 feet, to a black oak tree near a small ravine on the north side of turnback creek." Carter v. Bacigalupi, 23 Pac. Rep. 361.

5. A tree, if sufficiently described, may constitute a monument, reference to which may fix the position of the claim. Quimby v. Boyd, 8 Colo. 194; 6 Pac. Rep. 462.

6. A bearing from a point on a claim to two mountain peaks will be held sufficient as fixing the *locus* of the claim by reference to natural objects, in the absence of any con-

trary showing. Craig v. Thompson, 10 Colo. 517; 16 Pac. Rep. 24.

7. Stakes or stones may be regarded as permanent monuments, reference to which will fix the position of the claim. A claim may be sufficiently described, also, by reference to neighboring claims. Russell v. Chumeraso, 4 Mont. 309; 1 Pac. Rep. 713; 15 Mor. Min. Rep. 503.

8. A location certificate describing the claim as being west of and adjoining the Gambetta claim, and describing the claim located by metes and bounds, is sufficient, *prima facie*. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

9. A location notice describing a claim as being fifteen hundred feet by six hundred feet from the discovery stake, and "about 1500 feet south of Vaughn's Little Jennie Mine," held to be sufficient in the matter of description. Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153. See, also, 130 U. S. 291.

10. A description of the claim in the location certificate by reference to blazed trees, rock monument or a discovery shaft, may be sufficient. Hansen v. Fletcher, 10 Utah, 266; 37 Pac. Rep. 480.

11. A location record which describes the claim as bounded by four other claims and marked by monuments at the corners is *prima facie* sufficient in the matter of description. Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; 9 Mor. Min. Rep. 513.

12. A claim was described in the notice of location as follows: "Beginning at the westerly end of the Gilpin Mining Company's property, on the Williams Lode, in Lake Gulch Mining District; runs thence in a westerly direction a distance of fifty feet to the easterly end of Packard and Updegraph's property on said lode." This description was held to be insufficient, and the location certificate inadmissible in evidence, though the other claims mentioned were patented ones. Gilpin County M. Co. v. Drake, 8 Colo. 586; 9 Pac. Rep. 787.

13. In the description of the boundaries in a conveyance, monuments designated as the corners of the tract conveyed will prevail over designated measurements, and parol evidence is admissible for the purpose of pointing out these monuments and showing the identity of the land conveyed with that upon which trespass was committed. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98; S. C., 96 Cal. 33; 30 Pac. Rep. 839.

14. A location certificate which described the claim as running a certain number of feet southeast from the discovery shaft and a certain number northwest, and as being situate fifteen hundred feet north of the Hawkeye Lode, was held insufficient in the matter of description and inadmissible in evidence. Drummond v. Long, 9 Colo. 538; 13 Pac. Rep. 543; 15 Mor. Min. Rep. 510.

15. A location certificate describing the claim only by reference to neighboring claims is insufficient, and not receivable in evidence. Baxter Mtn. G. M. Co. v. Patterson, 3 New Mex. 179; 3 Pac. Rep. 741; 3 West Coast Rep. 77. (Overruled in Seider v. Maxfield, 4 New Mex. 374; 20 Pac. Rep. 794.)

16. A location notice should contain a description of the ground located, and the same should be marked on the ground. Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645.

17. A location notice need only give fairly and reasonably a description of the claim to guide subsequent locators. Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

18. An erroneous description of the legal subdivisions by which a placer claim is located, in the location certificate, will not invalidate the location where the abutting legal subdivisions are correctly described therein. Cullacott v. Cash G. & S. M. Co., 8 Colo. 179; 6 Pac. Rep. 211; 15 Mor. Min. Rep. 392; Duryea v. Boucher, 67 Cal. 141; 7 Pac. Rep. 421.

19. A patent is not conclusive as to the correct boundaries and as to the *locus* of the claim, but may be shown to be erroneous in the matter of the description. Bell v. Skillicorn, 28 Pac. Rep. 768.

20. The judgment on an adverse suit should describe the land as described by the verdict. Bushnell v. Crooke M. & Sm. Co., 11 Colo. 247; 21 Pac. Rep. 931.

EVIDENCE.

1. *Abandonment—Forfeiture.*
2. *Adverse.*
3. *Burden of Proof.*

4. *Character of Land.*
5. *Citizenship.*
6. *Dip — Apex.*
7. *Discovery.*
8. *Entry.*
9. *Expenditure.*
10. *Location.*
11. *Mining District Rules.*
12. *Patent.*
13. *Suits for Possession.*
14. *General.*

1. *Abandonment — Forfeiture.*

(See ABANDONMENT, p. 128.)

1. Proof of a legal location of a mining claim and of possession thereof is proof of such a title as may be overthrown only by proof of forfeiture of the claim by failure to make the required annual expenditure thereon. Hammer v. Garfield M. & M. Co., 130 U. S. 291; Quigley v. Gillett, 101 Cal. 462; 35 Pac. Rep. 1040; Oreamuno v. Uncle Sam G. & S. M. Co., 1 Nev. 215; 1 Mor. Min. Rep. 32; McNeil v. Pace, 3 L. D. 267.

2. Where a legal location is proved, the burden of proving forfeiture thereof is upon the one claiming under an adverse relocation. Hammer v. Garfield M. & M. Co., 130 U. S. 291; Quigley v. Gillett, 101 Cal. 462; 35 Pac. Rep. 1040.

3. Forfeiture must be specially pleaded to render evidence thereof admissible. Hammer v. Garfield M. & M. Co., 130 U. S. 291; Morenhaut v. Wilson, 52 Cal. 263; 1 Mor. Min. Rep. 53; Quigley v. Gillett, 101 Cal. 462; 35 Pac. Rep. 1040; Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345; Wulff v. Manuel, 9 Mont. 279; 23 Pac. Rep. 723; Mattingly v. Lewisohn, 35 Pac. Rep. 111; Bishop v. Baisley, 41 Pac. Rep. 936.

4. Forfeiture of a mining claim under the mining laws must be specially pleaded, and cannot be shown under the general issue. Morenhaut v. Wilson, 52 Cal. 263; 1 Mor. Min. Rep. 53.

5. The defendant in an ejectment suit involving a mining claim may prove plaintiff's title to have been lost by abandonment of the claim under a general denial of plaintiff's title. Bell v. Brown, 22 Cal. 671; 5 Mor. Min. Rep. 240.

6. Proof of the abandonment of a mining claim by a defendant may be given by plaintiff in ejectment therefor without a special plea, where the defendant pleads, and relies on as a defense to the action, a location prior to that of plaintiff. Trevaskis v. Peard, 44 Pac. Rep. 246 (Cal.).

7. Abandonment need not be specially pleaded in order to allow proof thereof. Bell v. Bed Rock T. & M. Co., 36 Cal. 214; 1 Mor. Min. Rep. 45.

8. Where defendant in an adverse suit relies upon a relocation of plaintiff's claim after forfeiture thereof, he is not obliged to plead such forfeiture specially. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

9. The burden of clearly proving forfeiture of a mining claim is upon one who bases his claim thereon. Hammer v. Garfield M. & M. Co., 130 U. S. 291; Johnson v. Young, 18 Colo. 625; 34 Pac. Rep. 173; Oreamuno v. Uncle Sam G. & S. M. Co., 1 Nev. 215; 1 Mor. Min. Rep. 32; Coleman v. Curtis, 12 Mont. 301; 30 Pac. Rep. 266; McNeil v. Pace, 3 L. D. 267.

10. Although the burden of proving forfeiture is upon one relying upon the same, he has made out a *prima facie* case by showing no work to have been done *on* the claim, and if the party denying the forfeiture relies on work done *outside* of the claim, it devolves upon him to show such work to have been done for the benefit of the claim. Hall v. Kearney, 18 Colo. 505; 33 Pac. Rep. 373.

11. The question of abandonment is one of intention. The intention to abandon is not conclusively disproven by the statement of the owner, but the question is to be decided upon a consideration of all the facts in the case. Myers v. Spooner, 55 Cal. 257; 9 Mor. Min. Rep. 519.

12. Continuous possession and performance of annual assessment work are sufficient to disprove a charge of abandonment. Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 183.

13. One claiming by relocation must first introduce evidence going to show abandonment before he will be allowed to prove relocation. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

14. Upon the issue of forfeiture of a mining claim, the conduct and interest of those who claim by relocation after such alleged forfeiture may be considered in weighing the testimony. Doherty v. Morris, 17 Colo. 105; 28 Pac. Rep. 85.

15. A relocation of a mining claim is an implied admission of the validity of the original location and an assertion that the relocator claims a forfeiture by reason of a failure on the part of the original locator to make his annual expenditures. Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795.

16. Where, in the location certificate of a mining claim of which entry has been made, it is stated that the location is upon an abandoned claim, the entryman is not required to furnish evidence of such abandonment, as the owner of the claim alleged to be abandoned loses his rights by failure to file an adverse claim. Manhattan & San Juan S. M. Co., 2 L. D. 698.

2. *Adverse.*

(See ADVERSE, p. 297.)

17. An adverse complaint must allege a location to have been made in accordance with mining district rules, and proof of compliance with them must be made. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304. (Second trial, 17 Colo. 243; 29 Pac. Rep. 173.) Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487; Cons. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

18. In an adverse suit, even if the plaintiff offers no testimony, the defendant is not entitled to a judgment unless he affirmatively proves his title. Becker v. Pugh, 17 Colo. 243; 29 Pac. Rep. 173. (First trial, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304.)

19. In an adverse suit each party must prove his title, and if no proof is submitted the suit will simply be dismissed without judgment. Bay State S. M. Co. v. Brown, 10 Sawy. 248.

20. In an adverse suit each party must prove his right to a patent by a compliance with the statutes, State and Federal, and with miners' rules and regulations in force relative to location (not a mere occupancy), in order to recover a judgment for the ground in controversy. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304. (Second trial, 17 Colo. 243; 29 Pac. Rep. 173.) Bryan v. McCaig, 10 Colo. 309; 15 Pac. Rep. 413.

20a. Each party to an adverse suit must prove his own right and title. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

21. A plaintiff in a suit based upon an adverse claim must show possessory title to the premises, not only as against the defendant, but against the United States. Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

22. One party to an adverse suit may show the location of the other to be invalid because based upon a discovery made within a prior subsisting location, without connecting himself with such prior location. Armstrong v. Lower, 6 Colo. 393; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.) Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482; Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362.

23. In ejectment for a mining claim, where it appears that the discovery shafts of both parties are identical, evidence that the discoveries were made on lands patented prior to the dates of discovery of either party should be admitted, and if the fact is found neither party can recover. Moyle v. Bullene, 44 Pac. Rep. 69 (Colo.).

24. An adverse claimant may show the abandonment of any one of several locations embraced in an application. Good Return M. Co., 4 L. D. 221.

3. *Burden of Proof.*

(See CHARACTER OF LAND, p. 341.)

25. An adverse locator must show abandonment of the prior location affirmatively. Coleman v. Curtis, 12 Mont. 301; 30 Pac. Rep. 266.

26. In an action for the possession of a mining claim, a party relying upon a forfeiture by his adversary must specially plead such forfeiture; and the facts constituting the same must be alleged and proven upon the trial. Wulff v. Manuel, 9 Mont. 279; 23 Pac. Rep. 723.

27. One who bases his title upon the forfeiture of the claim of another has the burden of clearly establishing such forfeiture. Hammer v. Garfield M. & M. Co., 130 U. S. 291; S. C., 6 Mont. 53; 8 Pac. Rep. 153; Bishop v. Baisley, 41 Pac. Rep. 936.

28. The party basing his right on a relocation made because of alleged forfeiture or abandonment must prove the same. Orea-

muno v. Uncle Sam G. & S. M. Co., 1 Nev. 215; 1 Mor. Min. Rep. 82.

29. Although the burden of proving forfeiture is upon one relying upon the same, he has made out a *prima facie* case by showing no work to have been done *on* the claim, and if the party denying the forfeiture relies on work done *outside* of the claim, it devolves upon him to show such work to have been done for the benefit of the claim. Hall v. Kearney, 18 Colo. 505; 33 Pac. Rep. 373.

30. The burden of proof is on one attacking the return of lands by the United States Surveyor General. Nita v. State of Wisconsin, 9 L. D. 385.

31. The burden of proof is upon one attacking the *prima facie* agricultural character of the land. Savage v. Boynton, 12 L. D. 612.

32. Land was returned as non-mineral in character, and was entered (by cash entry) as such. Subsequently the surveys were suspended. A hearing was ordered on a contest by a mineral contestant to determine the character of the land at the date of the cash entry. Before trial a new public survey was approved, returning the land as mineral in character. *Held*, that the burden of proof was upon the agricultural claimant to show the land not to have been known to be mineral at date of his entry. Aspen Cons. M. Co. v. Williams, 23 L. D. 34. (Following case of Johns v. Marsh, 15 L. D. 196, as to actual mining operations not being necessary.)

33. Where land is returned as mineral in character by the United States Surveyor General, and is entered by a homestead claimant who files his non-mineral affidavit, an affidavit of a mineral claimant alleging its mineral character will offset the agricultural claimant's non-mineral affidavit, and place the burden of proving the non-mineral character upon him. Dickinson v. Capen, 14 L. D. 426.

34. Where land returned as mineral is decided upon a hearing had to be non-mineral, the burden thereafter is upon one alleging its mineral character to show it as a present fact. Kane v. Devine, 7 L. D. 532.

35. Where land is returned as mineral, the burden is upon an agricultural claimant to show that it is non-mineral, but he is not bound to prove it to be valuable for agriculture. Mulligan v. Hansen, 10 L. D. 311.

36. Where land is returned as mineral, the burden of proof is upon the agricultural claimant to prove that it is more valuable for agriculture than for mineral. Cutting v. Reininghaus, 7 L. D. 265.

37. The fact that land has been located as a mining claim is not, in itself, proof of the mineral character of the land, especially where the burden of proof is upon the mineral claimant. Etling v. Potter, 17 L. D. 424.

38. The report of a United States Deputy Mineral Surveyor who examines a placer mining claim in his official capacity, which shows the land to be mineral in character, overcomes the slight presumption raised by its return by the United States Surveyor General as agricultural in character, and places the burden of proof upon one alleging its non-mineral character. State of Washington v. McBride, 18 L. D. 199.

39. Where land returned as agricultural in character has been embraced in a *prima facie* valid mineral application, the slight presumption raised by the return of the United States Surveyor General is overcome, and the burden of proof is on one alleging its agricultural character. N. P. R. R. Co. v. Marshall, 17 L. D. 545.

40. The allowance of mineral entry is an adjudication of the mineral character of the land entered, and the burden of proof is thereafter upon one who alleges its non-mineral character. Johns v. Marsh, 15 L. D. 196.

41. The burden of proof is upon one attacking the validity of a regularly allowed mineral entry. Tangerman v. Aurora Hill M. Co., 9 L. D. 538.

42. The allowance of a mineral entry on land returned by the United States Surveyor General as agricultural overcomes the presumption raised by such return, and the burden of proof is thereafter upon one alleging the non-mineral character of the land. Walton v. Batten, 14 L. D. 54.

43. Where a mineral entry has been allowed on satisfactory evidence of compliance with the law, the burden is upon a contestant to show non-compliance. Hargrove v. Robertson, 15 L. D. 499.

44. A contestant against a pre-emption entry who alleges the land to have been known to be mineral at date of pre-emption entry has the burden of proving that it was more valuable for mining than for agricult-

ural purposes. Tinkham v. McCaffrey, 18 L. D. 517. To same effect, Creswell M. Co. v. Johnson, 8 L. D. 440; Harnish v. Wallace, 18 L. D. 108.

45. Where land is *prima facie* agricultural in character, the one alleging its mineral character must establish it by the actual production of mineral upon the land, not merely by proof of the existence of mineral on adjoining tracts, and it must appear that the land is more valuable for mineral than for agricultural purposes. Savage v. Boynton, 12 L. D. 612.

46. The burden of proving the land more valuable for mining than for agricultural purposes as a fact, is upon one attacking an original homestead entry of land returned by the United States Surveyor General as agricultural. Winters v. Bliss, 14 L. D. 59.

47. Where land was returned as agricultural in character, the burden is upon one alleging its mineral character to show "not that neighboring or adjoining lands are mineral in character or that the land in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that as a present fact, it is mineral in character, and this must appear from the actual production of mineral, and not from any theory that it may produce it. * * * He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value." Dughi v. Harkins, 2 L. D. 721. See, also, Hooper v. Ferguson, 2 L. D. 712; Caledonia M. Co. v. Rowen, 2 L. D. 714; Roberts v. Jepson, 4 L. D. 60; Cleghorn v. Bird, 4 L. D. 478; Commissioners of Kings County v. Alexander, 5 L. D. 126; Magalia G. M. Co. v. Ferguson, 6 L. D. 218; Dobler v. N. P. R. R. Co., 17 L. D. 103; Lentz v. Victor, 17 Cal. 271; Alford v. Barnum, 45 Cal. 482; 10 Mor. Min. Rep. 422.

48. Where land is returned as agricultural and is claimed as such, the burden is upon one alleging its mineral character to prove, not that some mineral has been found thereon, but that it can be mined at a profit. Departmental decision of May 14, 1896, *In re* Quigley v. State of California.

49. One claiming the right to enter land under the act of June 8, 1878, 20 Stat. 89 (Timber and Stone Act), has the burden of proving the land to be properly subject to entry under said act. Smith v. Buckley, 15 L. D. 321.

50. In an action to recover possession of a mining claim, plaintiff must prove some title superior to that of defendant by a preponderance of evidence, but need not prove his right to a patent. Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795.

51. "The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof." United States v. Iron Silver M. Co., 128 U. S. 673.

52. A mining claimant who claims the right to follow and work a lode on the dip under or into the claim of another has the burden of proving the apex of such lode to be in a valid location owned by himself. Iron Silver M. Co. v. Elgin M. & Sm. Co., 118 U. S. 196; 15 Mor. Min. Rep. 641; Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557. (See Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Rep. 304.) Cheesman v. Shreeve, 37 Fed. Rep. 36; Cheesman v. Hart, 42 Fed. Rep. 98; Doe v. Waterloo M. Co., 54 Fed. Rep. 935; Duggan v. Davey, 26 N. W. Rep. 887; Iron Silver M. Co. v. Campbell, 17 Colo. 267; 29 Pac. Rep. 513. (See 135 U. S. 286.) Leadville M. Co. v. Fitzgerald, 4 Mor. Min. Rep. 380. *Contra*, Montana Co. v. Clark, 42 Fed. Rep. 626.

53. The owner of a mining claim is the *prima facie* owner of all the mineral inside of his location, and the burden is on one claiming a right to follow a lode on its dip inside the claim of another to show that he is the owner and has a valid location of the apex of the lode. Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. Rep. 540; Duggan v. Davey, 26 N. W. Rep. 887.

54. A patentee has the *prima facie* right to all mineral within the surface lines of his claim, and the burden of proof is on one who claims the right to take the same as part of a lode dipping under said claim to show title to the same. Bell v. Skillicorn, 28 Pac. Rep. 768.

55. A plaintiff who sues defendant for taking ore from plaintiff's claim has the burden of proving that the vein worked by defendant has its apex in plaintiff's claim if that

fact is denied by defeIndant. Jones v. Prospect Mtn. M. Co., 21 Nev. 339; 31 Pac. Rep. 642. (Refusing to follow Bell v. Skillicorn, 28 Pac. Rep. 768.)

56. The owner of a lode claim has a *prima facie* right to all ore within the surface lines, and if another takes ore claiming it to be contained in a lode which has been located and which dips under the first claim, such fact must be proved to avoid liability. Driscoll v. Dunwoody, 16 Pac. Rep. 726.

57. The owner of a mining claim is to be regarded as the owner of all within his claim until some other person shows by a preponderance of evidence clear title to the apex of the lode dipping into the claim. Leadville M. Co. v. Fitzgerald, 4 Mor. Min. Rep. 380.

4. *Character of Land.*

(See CHARACTER OF LAND, p. 341.)

58. The location of a mining claim, *prima facie* valid, raises the presumption of the mineral character of the land. Sweeney v. N. P. R. R. Co., 20 L. D. 394.

59. The fact that land has been located as a mining claim is not, in itself, proof of the mineral character of the land, especially where the burden of proof is upon the mineral claimant. Etling v. Potter, 17 L. D. 424.

60. The fact that land was once embraced in a mining location, since abandoned, is not proof of its mineral character, which must appear as a present fact. Berry v. C. P. R. R. Co., 15 L. D. 463.

61. A certificate of location of a mining claim cannot be accepted in a contested case as establishing the mineral character of the land in the absence of evidence of an actual discovery of mineral. Etling v. Potter, 17 L. D. 424.

62. The location of a mineral claim on land returned as agricultural in character will rebut the presumption raised by the return and place the burden upon an agricultural claimant of proving its non-mineral character. N. P. R. R. Co. v. Marshall, 17 L. D. 545.

63. Land may be proven to be mineral in character without proof of the actual discovery of valuable deposits thereon, as by the fact that it is in the center of a valuable mineral belt, surrounded by valuable mines, that money is being spent preliminary to working it, and that the agricultural claimant has boasted of its mineral character. Pulliam v. Hunter, 2 C. L. O. 180.

64. The burden of proof, where land is returned as agricultural, is upon the mineral claimant, and he must show, not that the land in the neighborhood is mineral, and that theoretically the land in dispute must contain mineral, but that it actually does produce mineral. Dughi v. Harkins, 2 L. D. 721.

65. The fact that mineral (petroleum) has been discovered on adjoining tracts is not proof of the mineral character of the land. Roberts v. Jepson, 4 L. D. 60.

66. When mineral has been discovered upon the land in question, the value and extent of mineral deposits on neighboring tracts are proper matters for consideration as tending to show the value of the mineral deposits discovered upon the land involved. Santa Clara M. Ass'n v. Scorsur, 4 L. D. 104; Rucker v. Knisley, 14 L. D. 113; Hamilton v. Anderson, 19 L. D. 168.

67. Proof of the mineral character of the land must be of the actual production of mineral thereon, not that adjoining lands are of that character, nor that the land in question may hereafter develop mineral. Commissioners of Kings County v. Alexander, 5 L. D. 126.

68. Where land returned as non-mineral in character is claimed under the agricultural law, the burden is upon one alleging its mineral character to show that it is mineral in character as a present fact, not that adjoining tracts are such. Magalia Gold M. Co. v. Ferguson, 6 L. D. 218.

69. The proximity of land to coal veins will not warrant the conclusion that it is mineral in character where it is not returned as such and its mineral character is not made to appear as a present fact. John E. Williams, 11 L. D. 462.

70. Where land is *prima facie* agricultural in character, the one alleging its mineral character must establish it by the actual production of mineral upon the land, not merely by proof of the existence of mineral on adjoining tracts, and it must appear that the land is more valuable for mineral than for agricultural purposes. Savage v. Boynton, 12 L. D. 612.

71. The fact that land lies in a mineral belt and that neighboring tracts contain min-

eral does not show the land to be mineral in character. Warren v. State of Colorado, 14 L. D. 681.

72. The mere proximity of tracts containing coal does not stamp the land on which no coal has been found as coal land. Scott v. Sheldon, 15 L. D. 361.

73. A mineral claimant who contests an agricultural entry, alleging the mineral character of the land, must prove that the land contains mineral of commercial value and of an extent which would justify an expenditure of money in its development. This cannot be proved by showing the production of mineral from neighboring tracts. Departmental decision of March 16, 1896, *In re* Brown v. Schmidt.

74. In determining the value of land claimed to be valuable for coal, the fact that adjoining tracts are known to contain valuable deposits of coal may be considered in connection with the fact that coal has been discovered upon the land in question. Departmental decision of May 23, 1896, *In re* Seifred v. Minelli.

75. Where land was returned as agricultural in character, the burden is upon one alleging its mineral character to show "not that neighboring or adjoining lands are mineral in character or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that as a present fact, it is mineral in character, and this must appear from the actual production of mineral, and not from any theory that it may produce it. * * * He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value." Dughi v. Harkins, 2 L. D. 721.

76. The actual finding of mineral on the land must be shown before its mineral character will be recognized. Commissioners of Kings County v. Alexander, 5 L. D. 126.

77. The existence of mineral in such quantities as to justify expenditures in the effort to secure it should be established as a present fact in order to bring the land within the class subject to mineral entry. John Downs, 7 L. D. 71.

78. To stamp land as mineral in character, mineral must be actually found thereon, and a mere theory as to its existence will not be accepted as establishing its mineral character. Walton v. Batten, 14 L. D. 54.

79. A coal claimant contesting an original homestead entry must show the land to be valuable for coal deposits by actual production of the coal. Jones v. Driver, 14 L. D. 514.

80. The mineral character of land may be established by proof of the existence of mineral therein in paying quantities, and the actual operation of a mine on the land is not necessary to show the fact, as it may be demonstrated by experiment, prospecting and "panning." Johns v. Marsh, 15 L. D. 196.

81. Where land was returned as agricultural in character and is claimed as such, the question "is not whether the land is mineral in character, but whether the mineral character is such as to make the land more valuable for mining than for agricultural purposes, or whether the mineral character is shown to be such as to warrant the conclusion that the minerals might be obtained with the aid of known means and appliances in sufficient quantities and of such values as to make it more valuable for mining than for agricultural purposes." Creswell M. Co. v. Johnson, 8 L. D. 440.

82. On issue joined as to the character of the land, the question to be determined is whether as a present fact it is mineral, and more valuable for mining than for agriculture. Cutting v. Reinghaus, 7 L. D. 265; Creswell M. Co. v. Johnson, 8 L. D. 440; Peirano v. Pendola, 10 L. D. 536.

83. The burden of proving the land more valuable for mining than for agricultural purposes, as a fact, is upon one attacking an original homestead entry of land returned by the United States Surveyor General as agricultural. Winters v. Bliss, 14 L. D. 59.

84. Where land has been returned by the United States Surveyor General as agricultural in character, and it is claimed as such, the burden is on the mineral claimant to show, as a present fact, that the land is more valuable for mining than for agricultural purposes. Dobler v. N. P. R. R. Co., 17 L. D. 103.

85. In a hearing to determine the character of land, the mineral claimant need not show any profits resulting from mining operations thereon. Caledonia M. Co. v. Rowen, 2 L. D. 714.

86. Where land is returned as agricultural, and is claimed as such, the burden is upon one alleging its mineral character to prove, not that some mineral has been found thereon, but that it can be mined at a profit. Departmental decision of May 14, 1896, *In re* Quigley v. State of California.

87. The return of land as mineral by the United States Deputy Surveyor, and the approval of the survey by the United States Surveyor General and by the General Land Office, is *prima facie* proof of its mineral character. Johnston v. Morris, 72 Fed. Rep. 890.

88. The burden of proof is on one attacking the return of lands by the United States Surveyor General. Nita v. State of Wisconsin, 9 L. D. 385.

89. After lands had been set apart and designated as agricultural lands, they were *prima facie* of that character, and the burden of proof is upon him who traverses such character. Caledonia M. Co. v. Rowen, 2 L. D. 714.

90. The presumption raised by the mineral return of public lands will remain until disproven by testimony. Central Pacific R. R. Co., 13 C. L. O. 218.

91. The burden of proof, where land is returned as agricultural, is upon the mineral claimant, and he must show, not that the land in the neighborhood is mineral, and theoretically the land in dispute must contain mineral, but that it actually does produce mineral. Dughi v. Harkins, 2 L. D. 721.

92. Where land is returned as agricultural in character, and is so claimed, the burden of proof is upon one alleging the mineral character. Hooper v. Ferguson, 2 L. D. 712; Caledonia M. Co. v. Rowen, 2 L. D. 714; Dughi v. Harkins, 2 L. D. 721.

93. Where land was returned as agricultural, and is claimed as such, the burden is upon a mineral contestant to show its mineral character. Roberts v. Jepson, 4 L. D. 60.

94. The burden of proof is upon one attacking the *prima facie* agricultural character of the land. Savage v. Boynton, 12 L. D. 612.

95. Where land is returned as mineral, the burden is upon an agricultural claimant to show that it is non-mineral, but he is not bound to prove it to be valuable for agriculture. Mulligan v. Hansen, 10 L. D. 311.

96. Where land returned as agricultural in character has been embraced in a *prima facie* valid mineral application, the slight presumption raised by the return of the United States Surveyor General is overcome, and the burden of proof is on one alleging its agricultural character. N. P. R. R. Co. v. Marshall, 17 L. D. 545.

97. Land was returned as non-mineral in character and was entered by cash entry as such. Subsequently the surveys of the township were suspended. A hearing was ordered on a contest by a mineral claimant to determine the character of the land at the date of the cash entry. Before trial a new public survey was approved, returning the land as mineral in character. *Held*, that the burden of proof was upon the agricultural claimant to show the land not to have been known to be mineral at date of his entry. Aspen Cons. M. Co. v. Williams, 23 L. D. 34. (Following Johns v. Marsh, 15 L. D. 196, as to actual mining operations not being necessary.)

98. Where land returned as mineral is decided upon a hearing had to be non-mineral, the burden thereafter is upon one alleging its mineral character to show it as a present fact. Kane v. Devine, 7 L. D. 532.

99. The burden of proof is upon an agricultural claimant for land returned as mineral, but the presumption as to the character of the land is not forcible where it appears that, after long-continued mining operations over a considerable part of the land, it has been abandoned by mineral claimants as no longer profitable. Cutting v. Reininghaus, 7 L. D. 265.

100. The burden of proof, in this case, rests on the agricultural claimant, but he may show that he has improved the tracts and used them for agricultural purposes, and that "there have been no valuable mines of gold, silver, cinnabar or copper discovered thereon." Utter v. Boston Hydr. G. M. Co., 14 C. L. O. 257.

101. When land has been returned as agricultural in character on the township plats, but the township is afterwards withdrawn as mineral land, the burden of proof is upon the agricultural claimant to show its non-mineral character. Mull v. Ross, 4 C. L. O. 19.

102. Where land was returned as agricultural, and is so claimed, a mineral claimant must show it to be more valuable for mineral

than for agricultural purposes. Tinkham v. McCaffrey, 18 L. D. 517.

103. Clear and positive proof alone can overcome the mineral return of land near valuable mines. Town Site of North Leadville v. Searl, 7 C. L. O. 86.

104. The burden of proof is upon one attacking a judgment of the Department as to the character of land, and the showing must be strong to induce the Department to order a new hearing in such a case. McCharles v. Roberts, 20 L. D. 564.

105. As the land in question was returned as agricultural, and has never been withdrawn as mineral land, the burden of proof is upon the placer claimant to prove its mineral character. Hunt v. Bartholomew, 10 C. L. O. 293.

106. Where land is within a well-known mineral locality, the presumption before its survey is that it is mineral in character. Town Site of Deadwood, 8 C. L. O. 18.

107. Where land is returned as mineral in character by the United States Surveyor General, and is entered by a homestead claimant who files his non-mineral affidavit, an affidavit of a mineral claimant alleging its mineral character will offset the agricultural claimant's non-mineral affidavit, and place the burden of proving the non-mineral character upon him. Dickinson v. Capen, 14 L. D. 426.

108. The report of a United States Deputy Mineral Surveyor who examines a placer mining claim in his official capacity, which shows the land to be mineral in character, overcomes the slight presumption raised by its return by the United States Surveyor General as agricultural in character, and places the burden of proof upon one alleging its non-mineral character. State of Washington v. McBride, 18 L. D. 199.

109. Though the mineral character of a tract is admitted by the railroad company in a judicial proceeding instituted for the possession thereof by the company, yet the Department, in the administration of the law, is required to determine the actual character of the land in question. Where land in the vicinity of valuable mineral deposits is returned as mineral in character on the township plat, clear and positive proof of its non-mineral character can alone overcome the return of the United States Surveyor General. Departmental decision of April 17, 1880.

110. In contests between agricultural and mineral claimants, the mineral claimant must show that valuable mines have been discovered. Carron v. Curtis, 5 C. L. O. 8.

111. Where land has been adjudged mineral, an agricultural claimant who shows that mining operations thereon have been abandoned as unprofitable, in the absence of any other showing of the mineral character, is entitled to a decision holding it to be non-mineral. Thomas v. Thomasson, 16 L. D. 52.

112. In determining the character of land alleged to be chiefly valuable for coal, if coal has been *actually* produced, the probable extent of the deposit may be shown by testimony of expert geologists and miners. Rucker v. Knisley, 14 L. D. 113.

113. "But in determining the question of whether the land is mineral or not, such contingencies, possibilities, or even probabilities cannot be considered. * * * The statute does not reserve any land from entry as a homestead simply because some one is foolish or visionary enough to claim or work some portion of it as mineral ground, without reference to the fact whether there are any paying mines on it or not." United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 482.

114. In a hearing to determine the character of land, the mineral claimant may submit testimony as to its non-agricultural character, that a comparison may be drawn between its agricultural and mineral value. Caledonia M. Co. v. Rowen, 2 L. D. 714.

115. In determining whether or not land is more valuable for mining than for agricultural purposes, physical difficulties to the successful working of the land as a mine may be considered. State of Washington v. McBride, 18 L. D. 199.

116. The fact that land contains a thick vein of coal does not stamp it as mineral in character where it is shown that the coal cannot be profitably mined. Departmental decision of May, 20, 1896, *In re* Green v. Grumbler.

117. An assay establishes the mineral value only of the rock assayed, and is but slight evidence of the value of the vein from which the samples are taken. Cheesman v. Shreeve, 40

Fed. Rep. 787; Dobler v. N. P. R. R. Co., 17 L. D. 103.

118. Proof of the sale of the claim two years after the issuance of the town-site patent is not proof of the known mineral value of the land at the date of said patent. Richards v. Dower, 81 Cal. 44; 22 Pac. Rep. 304. See S. C., 151 U. S. 658.

119. As between mineral claimants, when it is alleged by one that the lode claim of the other was not based on a valid discovery prior to location, it is no part of the defense to show the existence of a valuable deposit of mineral. The value of the mineral deposit is a matter into which the government does not inquire after discovery and location, save in controversies between mineral and agricultural claimants. Tam v. Story, 21 L. D. 449.

120. An applicant for a mineral patent must show the land claimed to contain valuable mineral, and that the improvements upon the claim tend to its development. John Downs, 7 L. D. 71.

121. Land to be enterable under the mineral land law must be shown to contain mineral in such quantities as will render profitable the working of the claim. It must, under the placer law, contain a valuable deposit. Royal K. Placer, 13 L. D. 86.

122. The non-mineral character of land claimed as a mill site must be affirmatively shown under oath. Alta Mill Site, 8 L. D. 195; Gold Springs & Denver City Mill Site, 13 L. D. 175; Patterson Quartz Mine, 4 C. L. O. 8.

5. *Citizenship.*

(See CITIZENSHIP, p. 48.)

123. In the absence of evidence to the contrary, locators are presumed to be either citizens or to have declared their intention to become such. Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 158. See S. C., 130 U. S. 291.

124. Locators of mining claims must be citizens. A transfer by an alien does not cure the defect, and the claim of the transferees is not good. The presumption, however, is in favor of the locators' qualifications. Want of qualifications must be proved. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

125. Locators and intermediate owners of mining claims will not be presumed aliens in the absence of allegations to that effect prior to the issuance of patent. Wandering Boy Lode, 2 C. L. O. 2.

126. An affidavit of claimant's citizenship made by him is sufficient proof, not only before the Land Department, but before the courts, in all cases arising under chapter 6, title XXXII, United States Revised Statutes. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 503; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529. See, also, North Noonday M. Co. v. Orient M. Co., 11 Fed. Rep. 125.

127. On adverse suit, proof of citizenship may consist, in case of an individual, of his own affidavit thereof, and, in case of an association of persons unincorporated, of the affidavit of their authorized agent made upon his own knowledge, or upon information and belief. O'Reilly v. Campbell, 116 U. S. 418.

128. The testimony of one plaintiff that he was a citizen of the United States at the time of location, and that the other plaintiffs were his children, born in California, is sufficient proof of citizenship of the plaintiffs at the time of location by them. Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182.

129. The oath to a notice of location required by the Montana statutes, in which it is asserted by one of several locators that all of the locators are citizens of the United States, is *prima facie* proof of such citizenship. Hammer v. Garfield M. & M. Co., 130 U. S. 291.

130. On an adverse suit, if the citizenship of parties is not shown, the omission is fatal to their right of recovery. O'Reilly v. Campbell, 116 U. S. 418.

131. In a suit for trespass upon a mining location the plaintiff must show citizenship, and if the defendant justifies under another location he must show citizenship, as no rights could be acquired by a location without such qualification. Bohannon v. Howe, 2 Idaho, 417; 17 Pac. Rep. 583.

132. A corporation, applicant for a mining patent, must show compliance with local requirements in the matter of filing its articles of incorporation with the proper officer; but if such evidence is on file in one entry, reference may be made thereto in subsequent entries in lieu of again furnishing the same. Alta Mill Site, 8 L. D. 195; 9 L. D. 48 (review).

133. Proof of citizenship of a corporation under the United States mining law may

consist of a certificate by the proper officer that the company is incorporated. A certified copy of the articles of incorporation need not be furnished. Silver King M. Co., 20 L. D. 116; Rose Nos. 1 and 2 Lodes, 22 L. D. 83.

134. Evidence that one whose citizenship is in question has voted is admissible as tending to show citizenship. S. P. R. R. Co. v. Brown, 9 L. D. 173; Jones v. S. P. R. R. Co., 19 L. D. 270.

135. The fact that a party was not a citizen before disposing of the claim must be affirmatively shown by an adverse claimant. Kempton Mine, 1 C. L. O. 178.

6. *Dip — Apex.*

(See VEINS OR LODES, p. 17.)

136. The burden is upon one who asserts the right to follow a lode on its dip into the claim of another to show that he has a valid location on the apex of the lode. Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662; 23 Pac. Rep. 577; Iron Silver M. Co. v. Campbell, 17 Colo. 267; 29 Pac. Rep. 513. (See S. C., 135 U. S. 286.) Stevens v. Gill, 1 Mor. Min. Rep. 566, 576; 16 Am. Rep. 304; Stevens v. Williams, 1 McCrary, 480; 1 Mor. Min. Rep. 557.

137. One claiming the right to follow a lode outside his claim must show the same to be a continuous streak of quartz, ore or vein matter, not merely an indication such as a miner would follow with the expectation of finding ore. Fitzgerald v. Clark, 157 U. S. 696. See 17 Mont. 100; 42 Pac. Rep. 273.

138. When a vein or lode located on the apex passes on the dip outside the plane of the side lines extended vertically and encroaches on another's vein, it must be shown that the vein passing outside the side lines is a continuation of the vein located in order to give the right to pursue it. Iron Silver M. Co. v. Cheesman, 116 U. S. 529. See 2 McCrary, 191; 9 Mor. Min. Rep. 552.

139. The right to follow a lode on its dip rests on the ability to show a continuous body of ore from the apex on which the location is made to the ground in controversy. Hyman v. Wheeler, 29 Fed. Rep. 347; 15 Mor. Min. Rep. 519.

140. On the issue of continuity of a vein, expert testimony is admissible. Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645.

141. The owner of a mining claim is *prima facie* owner of all minerals inside his surface lines; but if evidence is introduced going to show that the vein in controversy has its apex outside of the claim, he must prove his right to it by proving its apex to be inside. Jones v. Prospect Mtn. Tunnel Co., 21 Nev. 339; 31 Pac. Rep. 642; Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. Rep. 540. (Refusing to follow Bell v. Skillicorn, 28 Pac. Rep. 768.)

142. One following a vein on its dip into the claim of another need only show the apex to be outside of such claim to defeat a suit by the owner of the same. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 11 Mor. Min. Rep. 411.

143. In a controversy as to ownership of the vein on the dip, the issuance of patent does not prove the correctness of the Land Department records as to the date of location; but this must be proved as any other matter would be. Last Chance M. Co. v. Tyler M. Co., 9 U. S. App. 613; 61 Fed. Rep. 557; Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645; Champion M. Co. v. Cons. Wyoming G. M. Co., 75 Cal. 78; 16 Pac. Rep. 513.

7. *Discovery.*

(See DISCOVERY, p. 32.)

144. A discovery will be presumed from the fact of location, unless there are allegations to the contrary. Cheesman v. Shreeve, 40 Fed. Rep. 787; Cheesman v. Hart, 42 Fed. Rep. 98; Sprucemont M. Co. v. Lewis, Sickel's Min. Dec. 214.

145. The record of a location certificate is presumptive evidence that a discovery was made as alleged therein. Cheesman v. Shreeve, 40 Fed. Rep. 787.

146. In the absence of an adverse claim it will be presumed that a lode exists in land covered by a regularly located lode mining claim. Apple Blossom Placer v. Cora Lee Lode, 21 L. D. 438.

147. Discovery will be presumed where there is no adverse claim filed or fraud shown, and the evidence is conflicting on that point. Wight v. Tabor, 2 L. D. 741.

148. Evidence that the discovery shaft is not upon claimed ground is admissible as going to show the invalidity of the claim. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

149. When the validity of a claim depends upon whether a lode has been discovered and located, evidence that such claim contains a vein within its boundaries at places other than at the discovery point is admissible. Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362. See 111 U. S. 350.

150. A discovery, although not made in the discovery shaft, may form the basis of a valid location. Hence, evidence of such a discovery is properly admissible. O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302.

151. A mineral discovery, sufficient to warrant the location of a mining claim, may be regarded as proven where mineral is found, and the evidence shows that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362; Shreeve v. Copper Bell M. Co., 11 Mont. 309; 28 Pac. Rep. 315; Davis' Adm'r v. Weibbold, 7 Mont. 107. (See S. C., 139 U. S. 507.) Castle v. Womble, 19 L. D. 455.

152. When the complaint in an action to annul a patent alleged in substance that no discovery had been made, and the evidence is conflicting, proof that the claim was considered valuable for mining purposes was held to be sufficient proof of its mineral character, and the patentees were not obliged to show that there was a reasonable probability of the claim becoming a source of profit to constitute it a mine within the meaning of the statute. United States v. King, 9 Mont. 75; 22 Pac. Rep. 498.

153. In an adverse suit to determine the right of possession of mining property, a finding by the jury that the plaintiff did not discover a vein or lode on the disputed premises will be set aside as contrary to the evidence where there was uncontradicted testimony by plaintiffs that they had sunk a shaft and had on a certain day discovered a vein or lode, and the indications were sufficient to warrant further work in exploiting it. Walsh v. Mueller, 16 Mont. 180.

154. Expert testimony is admissible to show that a claim contains such a vein as the miner discovering it would be likely to follow with the reasonable expectation of finding paying ore. Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362

155. Evidence as to the extent and richness of the vein as developed subsequent to location is inadmissible for the purpose of showing the location to have been based upon a discovery thereof. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404. See S. C., 5 Mont. 600; 6 Pac. Rep. 66.

156. An assay of rock taken from a claim subsequent to the location may tend to show that at date of location a lode existed within the claim, and so may tend to strengthen evidence of a discovery at date of location. Southern Cross Cons. G. & S. M. Co. v. Europa M. Co., 15 Nev. 389; 9 Mor. Min. Rep. 513.

157. Evidence of discovery must be clear and positive. Robert S. Hale, 3 L. D. 536; Silver Jennie Lode, 7 L. D. 6.

158. A discovery having been made, the probable value of the land for mineral may be shown by testimony as to the value of neighboring tracts. Hamilton v. Anderson, 19 L. D. 168.

159. A discovery need not be shown on each legal subdivision of a coal claim if the evidence goes to show the presence of coal thereon. Hamilton v. Anderson, 19 L. D. 168.

8. *Entry.*

(See ENTRY, p. 239.)

160. In the Federal courts a certificate of entry of land may not be considered as evidence of the holder's legal title, as the making of entry vests only equitable title in the entryman. Langdon v. Sherwood, 124 U. S. 74.

161. It is a general rule of law that a certificate of entry, like a patent, is conclusive of legal title, but this rule will not be followed where entry was made by defendant in an adverse suit after the dismissal of such suit where the suit was thereafter reinstated, and the cause will be tried as though it had never been dismissed. McEvoy v. Hyman, 25 Fed. Rep. 539; 15 Mor. Min. Rep. 300.

162. Proof of the signature of the Register must be submitted to render a certificate of entry admissible in evidence. Jackson v. McMurray, 4 Colo. 76; 12 Mor. Min. Rep. 164.

163. In an action upon an adverse claim, where plaintiffs, as evidence of their title, had introduced the Receiver's receipt for the entry thereof, it is admissible for the defendants to prove, by decisions of the Land De-

partment, that the receipt had been canceled and set aside on the protest against the issuance of patent. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

164. Where a mineral entry has been allowed on satisfactory evidence of compliance with the law, the burden is upon a contestant to show non-compliance. Hargrove v. Robertson, 15 L. D. 499.

165. The allowance of a mineral entry on land returned by the United States Surveyor General as agricultural, overcomes the presumption raised by such return, and the burden of proof is thereafter upon one alleging the non-mineral character of the land. Walton v. Batten, 14 L. D. 54.

166. The allowance of mineral entry is an adjudication of the mineral character of the land entered, and the burden of proof is thereafter upon one who alleges its non-mineral character. Johns v. Marsh, 15 L. D. 196.

167. A contestant against a pre-emption entry who alleges the land to have been known to be mineral at date of pre-emption entry has the burden of proving that it was more valuable for mining than for agricultural purposes. Tinkham v. McCaffrey, 13 L. D. 517.

168. Where a mineral entry was allowed on insufficient evidence of compliance with the law in the matter of expenditure upon the claim, supplemental evidence of compliance with the law may be submitted in the absence of a protest or adverse claim. James D. Rankin, 7 L. D. 411.

169. A decision of the local office "that the entry is held for cancellation subject to the right of further appeal" is not, when offered in evidence upon trial of adverse suit, open to objection that it does not cancel, but merely recommends cancellation. The effect of a decision of this kind is not destroyed by the use of such language. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

9. *Expenditure.*

(See EXPENDITURE, p. 224.)

170. Under section 2325, United States Revised Statutes, the certificate of the United States Surveyor General is evidence of the sufficiency of the work performed and improvements made upon a mining claim in his State, and in an action to annul a patent it is error to strike out of the answer that the Surveyor General for Montana took the evidence required by law, and decided that the work and improvements equaled $500. United States v. King, 9 Mont. 75; 22 Pac. Rep. 498.

171. "Work done outside of a mining claim, and with direct relation to the claim, may be considered as work done on the claim. The evidence of such work having been done should be received with great caution, and it should appear clearly that such work was intended for the improvement of such claim and no other." Kramer v. Settle, 1 Idaho, 485; 9 Mor. Min. Rep. 561.

172. Where an expense of sharpening picks as a part of the authorized work on a mining claim is sought to be proved, the exclusion of the evidence is proper where the counsel refused to inform the court, although requested to do so, as to whether he wished to show that the picks had been sharpened on the premises or before they were taken there. Hirschler v. McKendricks, 16 Mont. 211; 40 Pac. Rep. 290.

173. An ore-house, alleged to have been built for the development of a claim, must be proven to be used in connection with that particular claim on which it is built. McCaig v. Bryan, 10 Colo. 309; 15 Pac. Rep. 413.

174. The final decision, under judicial proceedings, that the claimant is not entitled to any credit for work done on the claim, renders it necessary that the supplementary evidence should clearly show that the value of the improvements or labor done upon or for the development of the claim since the date of said proceedings is not less than $500. James D. Rankin, 7 L. D. 411.

175. "In estimating the amount of work or improvements, the test is the reasonable value thereof." Mattingly v. Lewisohn, 8 Mont. 259; 35 Pac. Rep. 111.

176. The amount paid for performance of annual labor is not conclusive of its value, but is properly admissible in evidence. Quimby v. Boyd, 8 Colo. 194; 6 Pac. Rep. 462.

177. An affidavit of annual labor, where authorized by law to be filed as *prima facie* evidence of performance of the labor, may be filed as soon as the labor is done, even if before the expiration of the time limited therefor. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

178. An affidavit of performance of annual labor, when recorded, is *prima facie* proof of compliance with law in this respect under the Montana statutes. Coleman v. Curtis, 12 Mont. 301; 30 Pac. Rep. 266; Davidson v. Bordeaux, 15 Mont. 245; 38 Pac. Rep. 1075.

179. The law requiring affidavits of performance of annual labor to be filed with the recorder does not estop the claimant from proving performance of such labor by any other competent testimony. Book v. Justice M. Co., 58 Fed. Rep. 106.

180. When a valid location has been shown, performance of annual assessment work need not be shown unless non-performance thereof and relocation be alleged, and the evidence thereof given by the other party. Quigley v. Gillett, 101 Cal. 462; 35 Pac. Rep. 1040; Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345; Mattingly v. Lewisohn, 8 Mont. 259; 35 Pac. Rep. 111.

10. *Location.*

(See LOCATION, p. 77.)

181. If the record of a location certificate contains some description of the claim by reference to natural objects or permanent monuments, the sufficiency of the description should be left to the jury. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Taylor v. Middleton, 67 Cal. 656; 8 Pac. Rep. 594; 15 Mor. Min. Rep. 284; McGregor v. Donnelly, 67 Cal. 149; 7 Pac. Rep. 422; Russell v. Chumasero, 4 Mont. 309; 1 Pac. Rep. 718; 15 Mor. Min. Rep. 508; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 964; Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66; Flavin v. Mattingly, 8 Mont. 242; 19 Pac. Rep. 384; O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302; Gamer v. Glenn, 8 Mont. 371; 20 Pac. Rep. 654; Metcalf v. Prescott, 10 Mont. 283; 25 Pac. Rep. 1037; Dillon v. Bayliss, 11 Mont. 171; 27 Pac. Rep. 725; Brady v. Husby, 21 Nev. 453; 33 Pac. Rep. 801; Seider v. La Fave, 4 New Mex. 369; 20 Pac. Rep. 789; Seider v. Maxfield, 4 New Mex. 374; 20 Pac. Rep. 794. (The last two cases discuss this point and overrule Baxter Mtn. G. M. Co. v. Patterson, 3 New Mex. 179; 3 Pac. Rep. 741; 3 West Coast Rep. 77.)

182. It is not for the court to say, by mere inspection of the record of the location notice, what are, or what are not, natural objects or permanent monuments within the meaning of the law. That is a matter of proof. A reference to adjoining claims may be shown to sufficiently fix the *locus* of the claim located. Russell v. Chumasero, 4 Mont. 309; 1 Pac. Rep. 718; 15 Mor. Min. Rep. 508.

183. The statement that a mining claim is "situated about fifteen hundred feet N. W. by N. of the Mountain Pride lode," in a location record, is, in the absence of a showing to the contrary, a sufficient description of the *locus* of the claim. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

184. Reference in the record of location certificate to an adjoining mining claim as "the Gambetta lode claim on the east" is such a reference to a permanent monument as to render the record admissible in evidence; the sufficiency of the description, given also by metes and bounds, being a question for the jury. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

185. A location record which describes the claim as bounded by four other claims and marked by monuments at the corners is *prima facie* sufficient in the matter of description. Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; 9 Mor. Min. Rep. 513.

186. A location notice describing the claim as being 1500 feet by 600 feet from the discovery stake, and "about 1500 feet south of Vaughn's Little Jennie mine," was held sufficient in the matter of description of the claim. Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153. See, also, 130 U. S. 201.

187. A record of a location notice which on its face is so indefinite in the matter of description as to render it impossible to identify the claim therefrom, is inadmissible in evidence. Faxon v. Barnard, 2 McCrary, 44; 4 Fed. Rep. 702; 1 Colo. Law Rep. 147; 9 Mor. Min. Rep. 515; Gilpin County M. Co. v. Drake, 8 Colo. 586; 9 Pac. Rep. 787; Drummond v. Long, 9 Colo. 538; 13 Pac. Rep. 543; 15 Mor. Min. Rep. 510.

188. A statement in the record of location that the claim "is situated on the north side

of Iowa gulch, above timber line, on the west side of Bald Mountain," is not such a reference to a natural object as would render the record admissible in evidence. Faxon v. Barnard, 2 McCrary, 44; 4 Fed. Rep. 702; 1 Colo. Law Rep. 147; 9 Mor. Min. Rep. 515.

189. A claim was described in the location certificate as follows: "Beginning at the westerly end of the Gilpin County Mining Company's property, on the Williams lode, in Lake Gulch Mining District; runs thence in a westerly direction a distance of fifty feet to the easterly end of Packard and Updegraph's property on said lode." This description was held to be insufficient, and the location certificate inadmissible, though the other claims mentioned were patented ones. Gilpin County M. Co. v. Drake, 8 Colo. 586; 9 Pac. Rep. 787.

190. A statement in the record of location that the claim (described as containing a certain number of feet each way from discovery shaft, with surface ground of certain width) is situated "on the southwest side of Mount Hardin, in Portland Gulch, about 1500 feet north of the Hawk-Eye lode," is not a sufficient description of the *locus* of the claim to render the record admissible in evidence. Drummond v. Long, 9 Colo. 538; 13 Pac. Rep. 543; 15 Mor. Min. Rep. 510.

191. A reference in a location certificate to the discovery cut and the stakes on the claim located is not a sufficient reference to permanent monuments as to render the record admissible in evidence. McEvoy v. Hyman, 25 Fed. Rep. 596; 15 Mor. Min. Rep. 397.

192. A location certificate is inadmissible in evidence when it is obvious from a reading of it that there could be no certain description therein of the claim located. Darger v. Le Sieur, 8 Utah, 160; 30 Pac. Rep. 363. (Affirmed, 9 Utah, 192.)

193. A location certificate describing the claim only by reference to neighboring claims is insufficient, and not receivable as evidence. Baxter Mtn. G. M. Co. v. Patterson, 3 New Mex. 179; 3 Pac. Rep. 741; 3 West Coast Rep. 77. (Overruled in Seider v. Maxfield, 4 New Mex. 374; 20 Pac. Rep. 794.)

194. A description of the claim in the location certificate by reference to blazed trees, rock monument or a discovery shaft may be sufficient. Hansen v. Fletcher, 10 Utah, 266; 37 Pac. Rep. 480.

195. A record of location notice which identifies a point of the claim by bearings to mountain peaks is *prima facie* sufficient in the matter of description, and is admissible in evidence, though it may be thereafter proven insufficient. Craig v. Thompson, 10 Colo. 517; 16 Pac. Rep. 24.

196. Under section 2324, United States Revised Statutes, requiring that a location record of a mining claim shall contain such description of the claim located by reference to some natural object or permanent monument as will identify the claim, parol evidence is admissible to show that a natural object or monument referred to in the location, but not designated therein as a permanent object, is in fact permanent. Seider v. Lafave, 4 New Mex. 369; 20 Pac. Rep. 789; Seider v. Maxfield, 4 New Mex. 374; 20 Pac. Rep. 794. (Overruling Baxter Mtn. G. M. Co. v. Patterson, 3 New Mex. 171; 3 Pac. Rep. 741; 3 West Coast Rep. 77.)

197. A location notice should contain a description of the ground located, and the same should be marked on the ground. Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645.

198. A location notice need only give fairly and reasonably a description of the claim to guide subsequent locators. Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

199. A location certificate must show the claim to be marked in some way to be admissible in evidence. Gilpin County M. Co. v. Drake, 8 Colo. 586; 9 Pac. Rep. 787.

200. A location certificate, in itself fatally defective, may go to the jury in connection with a correct amended certificate. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

201. An original location notice, invalid for uncertainty of description, may be admitted in evidence in connection with an amended certificate, even though such amended certificate was not filed for record until after the commencement of suit, in order to show the date of the original acts of appropriation. The amended certificate is admissible, not as conferring any additional right, but as evidence descriptive of prior acquired rights. Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 663.

202. A description of a placer claim in the recorded notice of location, giving the name

of the claim and of adjoining claims, the size and its situation in a certain canyon, was held to be sufficient. Grady v. Early, 18 Cal. 108; 12 Mor. Min. Rep. 104.

203. A notice of location was held sufficient which described the claim as: "Commencing at a young black oak tree, about 400 feet northerly of an old cross-cut or drift, in the ravine; thence running southeasterly 1500 feet, to a black oak tree near a small ravine on the north side of turnback creek." Carter v. Bacigalupi, 23 Pac. Rep. 361.

204. A tree if sufficiently described may constitute a monument, reference to which may fix the position of the claim. Quimby v. Boyd, 8 Colo. 194; 6 Pac. Rep. 462.

205. Where the record of a location notice fixes the *locus* of the claim by reference to neighboring claims, it should be admitted in evidence. Russell v. Chumasero, 4 Mont. 309; 1 Pac. Rep. 713; 15 Mor. Min. Rep. 508.

206. Where reference is made in the location certificate to stakes, the sufficiency of the notice should be left to a jury. O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302.

207. If an original and an amended location certificate, taken together, give a sufficient description of the claim, they are admissible in evidence. McGinnis v. Egbert, 8 Colo. 41; 5 Pac. Rep. 653; 15 Mor. Min. Rep. 329.

208. Where, prior to the act of 1866, a record of location was required by the Idaho statute, but it was not required nor customary to insert in the record notice the number of feet claimed, a record of location, made under that law and custom, should not be excluded from evidence because of failure to show the number of feet claimed. Connor v. McPhee, 1 Mont. 73; 9 Mor. Min. Rep. 570.

209. A location notice, defective in that it fails to describe the claim with particularity, may, if connected with the location of the claim by evidence, be admitted for the purpose of showing the date of the initiation of a mining claim in Alaska. Bennett v. Harkrader, 158 U. S. 441.

210. The record of a location certificate is presumptive evidence that a discovery was made as alleged therein. Cheesman v. Shreeve, 40 Fed. Rep. 787.

211. The record of a location certificate is presumptive evidence of a valid location. Cheesman v. Hart, 42 Fed. Rep. 98.

212. A location certificate, when recorded, is *prima facie* proof of what is therein stated, according to statutory provisions. Jantzen v. Arizona Copper Co., 20 Pac. Rep. 93; Flick v. Gold Hill & Lee Mtn. M. Co. 20 Pac. Rep. 807.

213. A certified copy of location notice is proof only of performance of one of the four acts necessary to make a valid location, of the date of location, and is a description of the ground located. Strepy v. Stark, 7 Colo. 614; 5 Pac. Rep. 111; 4 West Coast Rep. 663.

214. A location notice is not of itself evidence of legal possession, but is evidence of one step taken to acquire such possession. Thompson v. Lee, 8 Cal. 276; 1 Mor. Min. Rep. 610.

215. Section 2324, United States Revised Statutes, governing the recording of mining claims, cannot be held to exclude parol proof of actual possession and the extent of that possession. Campbell v. Rankin, 99 U. S. 261; 12 Mor. Min. Rep. 257.

216. Parol evidence is admissible to define what tract is embraced in a location. Prince of Wales Lode, 2 C. L. O. 2. (Citing Kelley v. Taylor, 23 Cal. 14.)

217. Where a miner alleges that his recorded location notice does not correctly describe his claim, he must show clearly that his claim was plainly marked on the ground in order to defeat the claim of a subsequent locator of a conflicting claim. Pollard v. Shively, 5 Colo. 309; 2 Mor. Min. Rep. 229.

218. Where a location notice calls for a post to mark the corner, it is not admissible on the part of claimant to show said corner to be marked by a stump. Pollard v. Shively, 5 Colo. 309; 2 Mor. Min. Rep. 229.

219. In the absence of proof or an allegation to the contrary, it is to be presumed that the locator of a mine complied with the law before recording his location. Juniper Mine (B), 4 C. L. O. 114.

220. The affidavit to the correctness of a location notice required by the Montana statute must cover the date of location and *all* material facts required to be stated in the certificate, to render the location notice admissible in evidence. O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. Rep. 302; McCowan v. Maclay, 16 Mont. 234; 40 Pac. Rep. 602.

221. An objection to the introduction of a location certificate not under oath was prop-

erly sustained by the court under the Montana act of May 8, 1873. Russell v. Hoyt, 4 Mont. 412; McBurney v. Berry, 5 Mont. 300; 5 Pac. Rep. 867.

222. The statutes of Montana requiring a record to be made of a vein mining claim cannot be construed to include placer claims. The record of location was therefore no part of the evidence of title to a placer claim, and hence was inadmissible. Moxon v. Wilkinson, 2 Mont. 421; 12 Mor. Min. Rep. 602.

223. The location notice recited that the west end corners were marked by pine trees. The evidence disclosed that it was distinctly marked on the ground, but that there were stakes at the west end corners instead of pine trees. The notice referred to another claim as a permanent monument. *Held*, that this was a sufficient notice and properly admissible. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

224. A location certificate sworn to under the Montana statute, the date in the jurat of which is one year previous to the date of location as stated in the certificate, is inadmissible unless the discrepancy is explained. Berg v. Koegel, 16 Mont. 266; 40 Pac. Rep. 605.

225. A location notice is proper evidence in connection with a patent to show the claim to which the patent refers. Goller v. Fett, 30 Cal. 481; 11 Mor. Min. Rep. 171.

226. Slight errors in a location certificate do not render it invalid or inadmissible in evidence. Gamer v. Glenn, 8 Mont. 371; 20 Pac. Rep. 654.

227. If all steps required by local rules and regulations have been taken such as are sufficient to impart notice to all, a locator's rights will not be affected by a mistake of the recorder, and such a mistake in the matter of description may be remedied by parol testimony. Myers v. Spooner, 55 Cal. 257; 9 Mor. Min. Rep. 519.

228. Where the location of a mining claim is made both by posting notices and by designating fixed objects, such as trees, shafts and ditches, on or near its exterior boundaries, in an action between two companies involving the title to a portion of the ground, witnesses are not confined in their testimony to a statement of the contents of the notices, but may also state whether the location made included the ground in dispute. Kelly v. Taylor, 23 Cal. 11 (1863).

229. Where several persons post a notice of location on a mining claim, and sign the same as locators, a subsequent notice posted on the same claim, signed by some of the original locators and by other persons whose names did not appear in the first notice, is an original notice so far as the new locators are concerned, but does not affect the rights of the prior locators whose names are omitted, nor operate as an abandonment of the first location by the persons whose names are signed to both notices, and in an action by all the persons whose names are signed to the notices to quiet their title as against an adverse claimant, the second notice is admissible in evidence. Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182.

230. The title acquired by a valid location is presumed to continue in the absence of allegation and proof to the contrary. Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

231. The grantor of a mining claim may be called as a witness to prove the invalidity of the location sold. Johnson v. Parks, 10 Cal. 446; 4 Mor. Min. Rep. 316.

232. Declarations of a party in possession and claiming title to a mining claim, made before parting with his interest, against the validity of the location of such claim, are admissible in evidence against the grantee of the declarant. Harrington v. Chambers, 3 Utah, 94; 1 Pac. Rep. 362. See 111 U. S. 350.

233. The existence of a known lode is a question of fact for the jury. "It cannot be said, as a matter of law in advance, how much gold or silver must be found in a vein before it will justify exploitation and be properly called a known vein." Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394.

234. After the issuance of a placer patent the Land Department will not assume that a lode was known to exist within the placer claim because of the fact that a lode claim was located therein prior to the placer application. The known existence of the lode at that date must be shown as a fact by proof. Valley Lode, 22 L. D. 317.

235. A patent for a lode claim which is situated within the boundaries of a placer claim, covered by a prior patent, is not conclusive of the fact that the lode so patented

was known to exist at date of the application for the placer patent, and hence excepted from the placer patent. Iron Silver M. Co. v. Campbell, 135 U. S. 286. See 17 Colo. 267; 29 Pac. Rep. 513.

236. In assuming to issue patent for a lode claim alleged to have been known at the date of application for a placer patent (since issued), covering the land, the Department will proceed with caution, and will require the known existence of such lode at that date to be clearly shown. Departmental decision of May 13, 1896, *In re* Lucy L. Lode.

237. Proof of the location of a lode claim in a placer, at the date of the placer application for patent, is not proof of the known existence of the lode. Butte & Boston M. Co. v. Sloan, 16 Mont. 97; 40 Pac. Rep. 217.

238. An applicant for a lode claim within a patented placer must show affirmatively the existence of such mine and its location, and prove his possessory right and the value of work performed. Moyer v. Mike & Starr G. & S. M. Co., 10 C. L. O. 150.

239. Where entry is made of a lode claim in conflict with a patented placer claim, and it appears that the title under the placer patent to the ground in conflict is vested in the lode claimant, the known existence of the lode at the date of application for the placer patent may be shown by *ex parte* affidavits, as there could be no opposing party to render a hearing necessary. Valley Lode, 22 L. D. 713.

240. The fact that lodes were known to exist within a placer claim at date of application for placer patent will not warrant recommendation of suit to vacate the placer patent, where evidence of fraud is not clear, and the rights of *bona fide* purchasers have attached. The rights of persons owning lodes within the placer at date of the application for placer patent are not injured by the issuance of the patent. Departmental decision of Sept. 21, 1893, *In re* Haskill v. Upton.

241. Where the evidence submitted by the applicant for a placer patent shows the land applied for to be placer mining land, the character of the land cannot be questioned by one asserting an adverse claim who has not proceeded as directed by section 2326, United States Revised Statutes. Dahl v. Raunheim, 132 U. S. 260.

11. *Mining District Rules.*

(See MINING DISTRICT RULES, p. 70.)

242. The existence of miners' rules and regulations is not a matter of which a court can take judicial cognizance, but is a question of fact to be tried in the usual manner by a jury on testimony submitted. Parley's Park S. M. Co. v. Kerr, 130 U. S. 256; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Harvey v. Ryan, 42 Cal. 626; 4 Mor. Min. Rep. 490; Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487; Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; Poujade v. Ryan, 21 Nev. 449; 33 Pac. Rep. 659; King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480; Ralston v. Plowman, 1 Idaho, 595; 5 Mor. Min. Rep. 160.

243. The existence of mining district regulations or customs must be proven like any other fact by the best evidence, and parol testimony as to a custom should not be admitted when it is shown that there are duly recorded regulations. Ralston v. Plowman, 1 Idaho, 595; 5 Mor. Min. Rep. 160.

244. The existence and tenor of mining district regulations and customs are questions for the jury. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

245. Written mining district regulations once adopted are presumed to continue in force in absence of a showing to the contrary. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Riborado v. Quang Pang M. Co., 2 Idaho, 131; 6 Pac. Rep. 125; King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

246. It is presumed that the written laws of a mining district are in force, and any custom which conflicts with them must be clearly proved. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

247. Mining district rules must be offered in evidence as a whole. English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202.

248. While the local record of a mining community is the best evidence of the rules and customs governing mining interests, it is

not the best or only evidence of priority or extent of actual possession. Campbell v. Rankin, 99 U. S. 261; 12 Mor. Min. Rep. 257.

249. The rules and customs of a mining district may be proven by a written rule if such exists, or by any competent evidence of a custom. Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

250. The book containing local mining regulations is competent evidence under section 504, Civil Practice Act. Orr v. Haskell, 2 Mont. 225; 4 Mor. Min. Rep. 492.

251. Evidence of the local mining rules must consist of a copy from the proper custodian, who must be shown to be empowered to give certified copies thereof, and to certify that such was a copy of the laws then in force in such district. Roberts v. Wilson, 1 Utah, 292; 4 Mor. Min. Rep. 498.

252. When no mining regulations or customs are in force in a district where a mining claim is located, general customs then in force may be given in evidence upon the question of the reasonableness of its extent. A general uniform custom should be proved if one exists. Table Mtn. Tunnel Co. v. Stranahan, 20 Cal. 198 (1862); 9 Mor. Min. Rep. 457.

253. In the absence of a statute, a purported copy of mining district regulations must be shown by proper testimony to have come from the proper custody and be otherwise proven to be what it purports to be, and cannot be rendered admissible by submission of *ex parte* affidavits. Roberts v. Wilson, 1 Utah, 292; 4 Mor. Min. Rep. 498.

254. Mining district regulations, to be considered, must be shown to be in force. Harvey v. Ryan, 42 Cal. 626; 4 Mor. Min. Rep. 490; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

255. Proof of a record of a location is inadmissible unless a record is shown to be provided for by local statute or regulation. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

256. A local mining regulation or custom adopted after location of a claim cannot be given in evidence to limit the extent of a claim previously located. Table Mtn. Tunnel Co. v. Stranahan, 20 Cal. 198; 9 Mor. Min. Rep. 457; 31 Cal. 387 (1865).

257. Rules and customs of one district cannot be introduced to vary those of another district. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

258. Whether or not a miner's rule or custom is in force at a given time is a question of fact for the jury. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

259. Mining district laws when introduced in evidence are to be construed by the court, and whether by virtue of such laws a forfeiture has accrued is a question of law and cannot be submitted to the jury. Fairbanks v. Woodhouse, 6 Cal. 33 (1856); 12 Mor. Min. Rep. 86.

260. The legality of mining district regulations must be decided by the court and not left to the jury. Ralston v. Plowman, 1 Idaho, 595; 5 Mor. Min. Rep. 160.

12. *Patent.*

(See PATENT, p. 256.)

261. A patent for lands issued by the United States is conclusive in an action at law as to the legal title, and cannot be collaterally impeached in such action, unless it is absolutely void on its face or is issued without authority. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673. (Quoting Patterson v. Winn, 11 Wheat. 380; and citing Hoofnagle v. Anderson, 7 Wheat. 212; Boardman v. Reed, 6 Pet. 342; Bagnell v. Broderick, 13 Pet. 448; Johnson v. Towsley, 13 Wall. 72; Moore v. Robbins, 96 U. S. 535.)

262. While the general rule is that the decisions by the Land Department on questions of fact preliminary to the issuance of a patent are conclusive after the issuance of patent, "Where each party has a patent from the government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, we think it is competent, in any judicial proceedings where this question of superiority of title arises, to establish it by proof of those facts." Iron Silver M. Co. v. Campbell, 135 U. S. 286. See, also, 17 Colo. 267; 29 Pac. Rep. 513.

263. A mining patent is conclusive proof of discovery and location according to law. Such patent takes effect by relation as of

date of the location. Talbott v. King, 6 Mont. 131. See, also, 6 Mont. 76; 9 Pac. Rep. 434.

264. Issuance of a mineral patent "is *prima facie* evidence that a discovery of mineral was made; that the land was properly located as mineral land; that the application for patent, the notices given by the defendants [applicants] and all other steps required by the law had been regularly taken." N. P. R. R. Co. v. Cannon, 7 U. S. App. 507; Last Chance M. Co. v. Tyler M. Co., 15 U. S. App. 456.

265. "The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof." United States v. Iron Silver M. Co., 128 U. S. 673.

266. A patent is not conclusive as to the correct boundaries, and as to the *locus* of the claim, but may be shown to be erroneous in the matter of description. Bell v. Skillicorn, 28 Pac. Rep. 768.

267. A mineral patent renders *res judicata*, so far as the Land Department is concerned, the fact that the land was known to be mineral. Blackmore v. Reilly, 17 Pac. Rep. 72.

268. The issuance of a lode patent is conclusive proof that the claim is located on the apex of a vein. Iron Silver M. Co. v. Campbell, 17 Colo. 267; 29 Pac. Rep. 513. See S. C., 135 U. S. 286.

269. In a controversy as to the ownership of the vein on the dip, issuance of patent does not prove the correctness of the Land Department records as to date of location, but this must be proved as any other matter would be. Champion M. Co. v. Cons. Wyoming G. M. Co., 75 Cal. 78; 16 Pac. Rep. 513; Last Chance M. Co. v. Tyler M. Co., 61 Fed. Rep. 557; 9 U. S. App. 613; Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 345.

270. A patent passes government title to the surface and any vein or lodes beneath it not otherwise granted. Its issuance presumes a compliance with the mining laws. Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645.

271. The Supreme Court does not interfere with the title of a patentee on an alleged mistake of fact, or from wrong conclusions drawn from the testimony by the Land Department. It is only a case of fraud that will warrant a court in looking into the evidence. Lee v. Johnson, 116 U. S. 48.

272. A person claiming under a mineral location, to be entitled to the possession as against one claiming under a patent to a railroad company, must show that at date of such patent the land was *known* to be more valuable for mining than for agricultural purposes, and in determining the relative values for such purposes, subsequent changes cannot be considered. Hunt v. Steese, 75 Cal. 620; 17 Pac. Rep. 920.

273. A patent to a railroad company is not conclusive evidence that the land is non-mineral in character, and a party claiming under a subsequent mining patent may show that the land is mineral, and upon such showing being made his title will be quieted. Chicago Quartz M. Co. v. Oliver, 75 Cal. 194.

274. Where by the terms of a patent mineral lands are excluded from the grant, it is competent for the party claiming adversely to the patentee to show that the land in dispute is mineral in character, and therefore excepted from the operation of the patent. McLaughlin v. Powell, 50 Cal. 64; 10 Mor. Min. Rep. 424.

275. The United States will not attack its patent, regularly issued, for fraud in its procurement, unless such fraud is very clearly shown, especially where the land has passed into the hands of *bona fide* purchasers. Butte & Boston M. Co., 21 L. D. 125.

276. Suit to vacate a patent will not be recommended by the Land Department on the ground of fraud, unless the showing thereof is clear and specific. Thomas Starr, 2 L. D. 759.

277. Proceedings to vacate a patent for fraud in its procurement will not be recommended by the Land Department when the fraud is not clearly shown and the land has passed into the hands of a *bona fide* purchaser. G. T. Dickinson, 10 L. D. 449.

278. When the complaint in an action to annul a patent alleged in substance that no discovery had been made, and the evidence is conflicting, proof that the claim was considered valuable for mining purposes was held sufficient, and the patentees were not obliged to show that there was a reasonable probability of the claim becoming a source of profit.

to constitute a mine within the meaning of the statute. United States v. King, 9 Mont. 75; 22 Pac. Rep. 498.

279. One suing a patentee to have him declared trustee of the legal title for him must show that he is entitled to the patent, not merely that patent erroneously issued, for that would be material only in a direct proceeding to vacate the patent. Meyendorf v. Frohner, 3 Mont. 282; 5 Mor. Min. Rep. 559.

280. The limits of a patented mining claim may be identified by location monuments when the description of the claim in the patent by courses and distances is found to be incorrect. Cullacott v. Cash G. & S. M. Co., 8 Colo. 179; 16 Pac. Rep. 211; 15 Mor. Min. Rep. 392.

281. A location notice is proper evidence in connection with the patent to show the claim to which the patent refers. Goller v. Fett, 30 Cal. 481; 11 Mor. Min. Rep. 171.

13. *Suits for Possession.*

(See ADVERSE, p. 297, and SUIT, p. 445.)

282. When plaintiff's ownership and right of possession are put in issue by answer, he must show affirmatively a compliance with the act of Congress and local rules and regulations, and that he had thereby made a valid location. Garfield M. & M. Co. v. Hammer, 130 U. S. 291. (See S. C., 6 Mont. 53; 8 Pac. Rep. 153.) Terrible M. Co. v. Argentine M. Co., 5 McCrary, 639.

283. In an ejectment suit, where the plaintiff shows title by patent to a mining claim, and the defendant admits possession for town site purposes, the plaintiff is entitled to a judgment without showing that the surface is necessary to the working of his mine. Abbott v. Primeaux, 16 Nev. 361.

284. In ejectment, possession by the plaintiff is *prima facie* evidence of legal title, and is sufficient as against a mere trespasser. Campbell v. Rankin, 99 U. S. 261; 12 Mor. Min. Rep. 257.

285. In possessory actions, proof of possession of a mining claim is *prima facie* evidence of title. Patchen v. Keeley, 19 Nev. 404; 14 Pac. Rep. 347; Lebanon M. Co. v. Cons. Republican Mtn. M. Co., 6 Colo. 381; Sears v. Taylor, 4 Colo. 38; Funk v. Sterrett, 59 Cal. 613; Noyes v. Black, 4 Mont. 527; 2 Pac. Rep. 769.

286. In an action to recover possession of a mining claim, plaintiff must prove some title superior to that of defendant by a preponderance of evidence, but need not prove his right to a patent. Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795.

287. In questions involving the right of possession, proof of prior occupancy, and especially when accompanied by a deed showing color of right, should not be rejected by the court. Campbell v. Rankin, 99 U. S. 261; 12 Mor. Min. Rep. 257.

288. In actions of ejectment or trespass, possession by plaintiff has always been held *prima facie* evidence of the legal title, and as against a mere trespasser is sufficient. Campbell v. Rankin, 99 U. S. 261; 12 Mor. Min. Rep. 257. (Citing 2 Greenl. Ev., sec. 311; Atwood v. Fricot, 17 Cal. 37; 2 Mor. Min. Rep. 305; English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202; Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217.)

289. In possessory actions, proof of possession of a mining claim is *prima facie* evidence of title. Patchen v. Keeley, 19 Nev. 404; 14 Pac. Rep. 347; Lebanon M. Co. v. Cons. Republican Mtn. M. Co., 6 Colo. 381; Sears v. Taylor, 4 Colo. 38; Funk v. Sterrett, 59 Cal. 613; Noyes v. Black, 4 Mont. 527; 2 Pac. Rep. 769.

14. *General.*

290. "The discovery by the defendant of the Dahl lode, 200 or 300 feet outside of those boundaries, does not, as observed by the court below, create any presumption of the possession of a vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them." Dahl v. Raunheim, 132 U. S. 260.

291. In the absence of a contrary showing, it will be assumed that that portion of the vein on which the discovery shaft is sunk is the middle of the vein, from which surface ground on each side is to be measured. Hope M. Co., 5 C. L. O. 116.

292. It is presumed by the Land Department, in the absence of a contrary showing, that the lode extends in a straight line through the center of a surveyed claim. Bimetallic M. Co., 15 L. D. 309.

293. "A lode or vein is a body of mineral or mineral-bearing rock, within defined boundaries, in the general mass of the mountain.

In this definition the elements are the body of mineral or mineral-bearing rock, and the boundaries. With either of these things established, very slight evidence may be accepted as to the existence of the other." Hyman v. Wheeler, 29 Fed. Rep. 347; 15 Mor. Min. Rep. 519.

294. A party claiming mining ground not actually possessed, and beyond the *possessio pedis*, must show his right thereto by constructive possession, and he can show such constructive possession only by physical works and monuments or by local mining laws and rules and compliance therewith. Roberts v. Wilson, 1 Utah, 292; 4 Mor. Min. Rep. 498.

295. It is presumed, in the absence of evidence, that parties in possession of mining claims hold them according to the rules and customs of the miners in the district. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

296. Proof of posting of notice of application for patent in the local land office should be furnished by the register, but if not furnished by him the claimant may submit evidence on the point. Mimbres M. Co., 8 L. D. 457.

297. Where it is impossible to show positively that notice of application for a mineral patent remained posted in the local land office during the period of publication, the affidavits of the persons who were local officers during such period, to the effect that it was their custom to post such notices during the period of publication, may be accepted as satisfactory. Departmental decision of June 13, 1896, *In re* S. H. Standart.

298. The positive testimony of witnesses who saw the stakes marking a mining claim is of greater weight, aside from any question of credibility, than negative testimony of witnesses who did not find any stakes. McEvoy v. Hyman, 25 Fed. Rep. 596; 15 Mor. Min. Rep. 397.

299. "Probably in the majority of cases where a placer claim is located, other matters than the existence of valuable deposits of mineral enter into the estimate of its worth. Its accessibility to places where supplies and medical attendance can be obtained for the men engaged in working upon it, and timber secured to support the drifting or tunneling which may be necessary; the facility with which water can be brought to wash the mineral from the earth, sand or gravel with which it may be mingled; and the uses to which the land may be subjected when the claim is exhausted, may be proper subjects of consideration." United States v. Iron Silver M. Co., 128 U. S. 673. See 24 Fed. Rep. 568.

300. Co-tenants are presumed by law to own equal interests until the contrary is shown. Nippel v. Hammond, 4 Colo. 211.

301. The exclusion from entry and patent of a mining claim of conflict with another claim does not preclude the patentee from holding the excluded ground under his possessory title, and raises no presumption against such title. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

302. An applicant for a mineral patent must clearly show possessory title to the claim applied for. Montana Company, 6 L. D. 261.

303. *Ex parte* affidavits with no opportunity for cross-examination should not be considered in contested mining cases. France v. Harrison, 5 C. L. O. 66.

304. Where a lode claim conflicts with a placer, the lode discovery being some hundred feet outside of the conflict, there is no presumption of the continuation of the lode into the placer ground. Raunheim v. Dahl, 6 Mont. 167; 9 Pac. Rep. 892; 133 U. S. 260.

305. "When one has discovered a lode upon the unappropriated public domain, and has, within the proper time, in good faith, performed all the subsequent acts essential to a valid location, as provided by law, he is entitled to the presumption that his lode extends throughout the full length of the claim" (as against another lode claimant). The burden of proving this is upon the one denying it. Armstrong v. Lower, 6 Colo. 581; 15 Mor. Min. Rep. 458. (Affirming 6 Colo. 393; 15 Mor. Min. Rep. 631.) Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

306. "Generally, when a ledge has been traced for such a distance, in a claim of this size, it would not be an unreasonable presumption that it would continue in the same direction far enough to cross the end lines of the claim." Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. Rep. 597.

307. The location of a lode claim based upon a proper discovery, and made according to law, raises the presumption that the lode

extends the length of the claim, and the burden of proof is on one asserting the contrary. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

308. A certified copy of a paper signed by the "Acting Commissioner of the General Land Office" is admissible in evidence under section 891, United States Revised Statutes. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

309. In the description of the boundaries in a conveyance, monuments designated as the corners of the tract conveyed will prevail over designated measurements, and parol evidence is admissible for the purpose of pointing out these monuments and showing the identity of the land conveyed with that upon which trespass was committed. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98; S. C., 96 Cal. 33; 30 Pac. Rep. 839.

HEARING.

(See CHARACTER OF LAND, p. 337.)

1. A hearing involving land upon which final entry has been made may be ordered only by the General Land Office. Ravezza v. Binum, 10 L. D. 694; Johnson v. McKaurley, 16 L. D. 152.

2. A hearing to determine the character of the land covered by a mineral application, and the question of compliance with the law by the applicant, may be ordered by the local land office on protest filed. Devereux v. Hunter, 11 L. D. 214.

3. A mineral entry should not be canceled on the report of a special agent that claimant has not complied with the law and that the mining claim is valueless as such, but a hearing should be ordered by the General Land Office. Franklin L. Bush, 2 L. D. 788.

4. An applicant for a patent to a lode claim in a patented town site may, upon making a proper showing, be allowed a hearing to prove the known existence of the lode at date of the town site entry, with view to the recommendation by the Land Department of suit to vacate the town site patent as to the conflict. Thomas J. Laney, 9 L. D. 88.

5. Where entry is made of a lode claim in conflict with a patented placer claim, and it appears that the title under the placer patent to the ground in conflict is vested in the lode claimant, the known existence of the lode at date of the application for the placer patent may be shown by *ex parte* affidavits, as there could be no opposing party to render a hearing necessary. Valley Lode, 22 L. D. 713.

6. If the owner of a lode claim within a patented town site secures a reconveyance of the conflict to the United States, he may show by affidavits the known existence of the lode at the date of the town site entry, without going to a hearing for the purpose, as there could be no other party to such hearing. Com'r to Denver Office, July 10, 1896, *In re* Dump Lode.

7. One desiring to apply for a mineral patent for land covered by an existing mineral application may secure its cancellation by proving abandonment of the claim applied for, at a hearing to which the applicant is a party. Moylan C. Fox, 2 L. D. 766.

8. A hearing to determine the mineral or non-mineral character of land should not be ordered in the absence of an application to enter it. Central Pacific R. R. Co., 8 L. D. 30; 9 L. D. 613.

9. A mineral application should not be received for land covered by a homestead entry, but upon its tender a hearing should be ordered to determine the character of the land. (In this case the erroneously filed application was allowed to stand, pending such a hearing.) Hooper v. Ferguson, 2 L. D. 712.

10. Upon a sufficient showing by an applicant for a lode within the limits of a patented town site, a hearing will be ordered to determine whether or not the lode was known to be valuable for mineral at date of town site entry, with the view to the recommendation of suit to vacate the town site patent to the extent of the conflict, if such issue be decided in the affirmative. Thomas J. Laney, 9 L. D. 83; Plymouth Lode, 12 L. D. 513; Protector Lode, 12 L. D. 662; Pacific Slope Lode, 12 L. D. 686; Cameron Lode, 18 L. D. 369. But—

11. Modified by the South Star Lode (20 L. D. 204). See Commissioner to Denver Office, November 16, 1895, *In re* Antediluvian Lode, holding that, on such a hearing, if it be proved that the lode was known to be valuable at date of town site entry, patent may issue for the lode claim.

12. On a sufficient showing by the applicant for a lode claim situate in a patented

placer, a hearing may be ordered to determine whether the lode was known at the date of the placer application, with the view of recommending suit by the United States Attorney General to vacate the placer patent as to the conflict. Pikes Peak Lode, 14 L. D. 47. (Modified in South Star Lode, 20 L. D. 204.)

13. A coal contestant who offers to pay costs of a hearing in his contest against a coal entry, and upon whose showing the entry is canceled, has a preference right of filing upon the land, even though the hearing prayed was never ordered. Garner v. Mulvane, 12 L. D. 336.

14. Where a mineral entry has been allowed upon a satisfactory showing of the mineral character of the land, a hearing will not be ordered on the protest of an agricultural claimant unless it be alleged that the land was agricultural in character at date of the filing of mineral application for patent. Houghton v. McDermott, 15 L. D. 509.

15. A hearing should be ordered upon the protest of one alleging non-compliance by an entryman with the law relating to discovery, expenditures and notice of application. Weinstein v. Granite Mtn. M. Co., 14 L. D. 68.

16. A hearing should be ordered upon a duly corroborated protest alleging non-compliance with the law by an entryman. Waterloo M. Co. v. Doe, 17 L. D. 111.

17. Where, after publication of notice of application for patent and before entry, a mining claim is relocated by a stranger for failure on the part of the applicant to make the required annual expenditure, and such failure and relocation are shown at a hearing, the entry will be canceled and the parties left to litigate their conflicting claims in court. The Land Department will not pass upon the validity of the relocation in such a case. Little Pauline Lode v. Leadville Lode, 7 L. D. 506.

18. If testimony taken in one case is by stipulation to be considered in another, a certified copy must be filed in the second case. Fall v. Taylor, 13 L. D. 140. (Citing Davidson v. Parkhurst, 3 L. D. 140.)

19. It is within the discretion of the Commissioner to order a hearing to ascertain whether or not an applicant has complied with the law, and to determine the character of the land, notwithstanding the fact that the applicant has secured a favorable judgment as defendant in an adverse suit. Alice Placer, 4 L. D. 314; George H. Smith, 7 L. D. 415.

20. Where it is alleged by protest that, between the dates of application for patent and entry, a claim was abandoned and was relocated by protestant, a hearing will be ordered, and if the charge is proved the entry will be canceled. Sweeney v. Wilson, 10 L. D. 157.

21. A hearing may not be ordered on a protest against a mineral application during the pendency of an adverse suit against the applicant. Swaim v. Craven, 12 L. D. 294.

22. An order of the Commissioner directing a hearing is a discretionary action and an appeal will not lie therefrom. Bailey v. Olson, 2 L. D. 40; Florida Railway & Navigation Co. v. Miller, 3 L. D. 324; Heitkamp v. Halvorson, 3 L. D. 530; James H. Murray, 6 L. D. 124; Smalley v. Hawbilts, 8 L. D. 372; Reeves v. Emblen, 8 L. D. 444; Samuel J. Bogart, 9 L. D. 217.

23. The refusal to order a hearing, when it amounts to a denial of a right claimed, is an order from which an appeal will lie. Jackson v. McKeever, 3 L. D. 516; Turner v. Robinson, 3 L. D. 562; Henry C. Putnam, 5 L. D. 22; James H. Murray, 6 L. D. 124; Ulitalo v. Kline, 9 L. D. 377; Anderson v. Amador & Sacramento Canal Co., 10 L. D. 572; Frary v. Frary, 13 L. D. 478; Cameron v. McDougal, 15 L. D. 243; Spratt v. Edwards, 15 L. D. 290; Gray v. Whitehouse, 15 L. D. 352.

24. The doctrine of *res judicata* applies to the question of the character of the land only to the date of the hearing had. Zadig v. Central Pacific R. R. Co., 20 L. D. 26; Barnstetter v. Central Pacific R. R. Co., 21 L. D. 464.

25. A hearing will be allowed for the submission of evidence explanatory of a seeming discrepancy between the boundaries of a claim as located and as shown by the survey thereof. Emma Lode, 7 L. D. 169.

26. Where land returned as mineral is decided upon a hearing had to be non-mineral, the burden thereafter is upon one alleging its mineral character to show it as a present fact. Kane v. Devine, 7 L. D. 532.

27. Where, on testimony submitted at a hearing, it is finally decided that land is non-mineral in character, a hearing will not be ordered on the protest of another claimant who sets up nothing not considered in the first contest. Departmental decision of June 18, 1896, *In re* Spitzler v. Koch.

28. "Where one attacks an existing patent on allegations of fraud, with the purpose of himself entering the land on vacation of the patent, and a hearing is ordered to ascertain the facts, he should make such a *prima facie* showing at his own expense as will enable this Department to decide whether it will request suit to vacate the patent." Alexander Moore, 2 L. D. 761; Bullock v. Central Pacific R. R. Co., 11 L. D. 590.

29. A petition addressed to the General Land Office, asking that a suit be brought to vacate a patent, should be forwarded to the Department with a recommendation as to the advisability of ordering a hearing preliminary to the recommendation of such suit, as a hearing to determine whether or not suit should be recommended to vacate a United States patent should be ordered only by the Secretary of the Interior. Butte & Boston M. Co., 21 L. D. 125.

30. A judgment rendered upon an adverse suit, awarding the land involved to the applicant, does not preclude an investigation by the Land Department as to claimant's compliance with the law, and a rejection of the application for patent if non-compliance is found. George H. Smith (Bull of the Woods Mill Site), 7 L. D. 415.

31. A rehearing may be ordered where the first contest was dismissed through the fraudulent conduct of petitioner's attorney. A. M. Moses, 3 L. D. 57.

32. A rehearing will not be ordered because of newly-discovered evidence if such evidence might have been known and presented at the trial of the case. Long Jim v. Robinson, 17 L. D. 348.

33. Hearings under paragraphs 109 *et seq.* of the Mining Regulations should be held only when it becomes the duty of the local land office to allow final entry of the land. Com'r to Helena Office, Oct. 5, 1892, *In re* Samuel A. Robertson, and Feb. 3, 1894, *In re* William McMaster.

LAND DEPARTMENT.

I. REGULATIONS.
II. DECISIONS.
1. *Scope of Authority — Jurisdiction.*
2. *Adverse Claims.*
3. *Patent.*
4. *Patent, Vacation of.*
5. *Cancellation.*
6. *Secretary of the Interior.*
7. *Commissioner of the General Land Office.*
8. *Register and Receiver.*
9. *Surveyor General — Deputy Mineral Surveyor.*
10. *General.*

I. REGULATIONS.

104. The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. Sec. 2238, R. S., paragraph 9.

105. All fees or charges under this law may be paid in United States currency.

106. The register and receiver will, at the close of each month, forward to this office an abstract of mining applications filed, and a register of receipts, accompanied with an abstract of mineral lands sold, and an abstract of adverse claims filed.

107. The fees and purchase money received by registers and receivers must be placed to the credit of the United States in the receiver's monthly and quarterly account, charging up in the disbursing account the sums to which the register and receiver may be respectively entitled as fees and commissions, with limitations in regard to the legal maximum.

II. DECISIONS.

1. *Scope of Authority — Jurisdiction.*

1. The decisions of the Land Department on questions of *fact* within its jurisdiction (in the absence of fraud, mistake or imposition, other than error in judgment) are conclusive. Johnson v. Towsley, 13 Wall. 72; Shepley v. Cowan, 91 U. S. 330: Moore v. Robbins, 96 U. S. 530; Quinby v. Conlan, 104 U. S. 420; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Steel v. St. Louis Sm. Co., 106 U. S. 447; Lee v. Johnson, 116 U. S. 48; Aiken v. Ferry, 6 Sawy. 79; Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

2. Decisions of the Land Department, within the scope of its jurisdiction, are not reviewable in actions at law. French v. Fyan, 93 U. S. 169; Vance v. Burbank, 101 U. S. 514; Quinby v. Conlan, 104 U. S. 420;

St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Steel v. St. Louis Sm. Co., 106 U. S. 447; N. P. R. R. Co. v. Cannon, 7 U. S. App. 507; Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581; Gale v. Best, 78 Cal. 235.

3. Decisions of the Land Department may be reviewed as to questions of law involved. Aiken v. Ferry, 6 Sawy. 79.

4. Decisions of the Land Department upon legal points may be reviewed by the courts on *direct* proceedings for their correction or annulment; but this will not be done collaterally. Johnson v. Towsley, 13 Wall. 72; Vance v. Burbank, 101 U. S. 514; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Steel v. St. Louis Sm. Co., 106 U. S. 447; Baldwin v. Stark, 107 U. S. 463; Lee v. Johnson, 116 U. S. 48; Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581.

5. A finding of the Land Department of fact or mixed law and fact on a question within its jurisdiction, is conclusive in an action at law. Jeffords v. Hine, 11 Pac. Rep. 351; 15 Mor. Min. Rep. 575.

6. The courts are not bound by a decision of the Land Department on a question of law. Wisconsin Cent. R. R. Co. v. Forsythe, 158 U. S. 46.

7. Decisions of the Land Department may be inquired into when final if fraud, accident or mistake is alleged. Comegys v. Vasse, 1 Pet. 212; Cunningham v. Ashlet, 14 How. 377; Barnard's Heirs v. Ashley's Heirs, 18 How. 43; Garland v. Wynn, 20 How. 8; Lytle v. State of Arkansas, 22 How. 192; Lindsey v. Hawes, 2 Black, 554.

8. Decisions of the Land Department may be inquired into to see if a patentee should be declared trustee for another. Johnson v. Towsley, 13 Wall. 72; Warren v. Van Brunt, 19 Wall. 646.

9. While decisions of the Land Department on questions of law are not binding upon the courts, they are entitled to great respect, and ought not to be overruled without cogent reasons. United States v. Moore, 95 U. S. 760; United States v. Burlington, etc. R. R. Co., 98 U. S. 334; Kansas Pacific R. R. Co. v. Atchison R. R. Co., 112 U. S. 414; Brown v. United States, 113 U. S. 568; Hastings & Dakota R. R. Co. v. Whitney, 132 U. S. 357.

10. While the general rule is that the decisions by the Land Department on questions of fact preliminary to the issuance of a patent are conclusive after the issuance of patent, "Where each party has a patent from the government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, we think it is competent, in any judicial proceeding where this question of superiority of title arises, to establish it by proof of those facts." Iron Silver M. Co. v. Campbell, 135 U. S. 286. (Reversing 17 Colo. 267; 29 Pac. Rep. 513.)

11. "It has been often said by this court that the land officers are a special tribunal of a *quasi* judicial character, and their decision of the facts before them is conclusive. And we are not now controverting the principle that where a contest between individuals, for the right to a patent for public lands, has been brought before those officers, and both parties have been represented and had a fair hearing, that *those parties* are concluded as to all the facts thus in issue by the decision of the officers." United States v. Minor, 114 U. S. 233.

12. "It is the established doctrine expressed in numerous decisions of this court, that whenever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that Department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition or mistake, its determination is conclusive against collateral attack." Barden v. N. P. R. R. Co., 154 U. S. 288.

13. The officers of the Land Department "exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive." Barden v. N. P. R. R. Co., 154 U. S. 288; Carr v. Fife, 156 U. S. 494; Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155.

14. A decision of the Land Department as to the character of land is not conclusive as to the character as known subsequent to the trial of the case upon which the decision is rendered. Thomas v. Thomasson, 16 L. D. 52.

15. A final decision of the Land Department, holding a tract to be non-mineral, is conclusive up to date of hearing; but it does not preclude further inquiry based on subsequent development. Stinchfield v. Pierce, 19 L. D. 12.

16. The act of February 26, 1895 (28 Stat. 683, Idaho-Montana Act), does not suspend the jurisdiction of the Land Department to pass upon the character of land when necessary. Sweeney v. N. P. R. R. Co., 21 L. D. 65.

17. The authority of a United States corporation to take or hold mineral land may not be questioned by the Land Department. Rose Nos. 1 and 2 Lodes, 22 L. D. 83. *Contra*, Com'r to Leadville Office, Oct. 29, 1891, *In re* Buena Vista Electric Light Co.

18. A properly authenticated certificate of the existence of a corporation, applicant for a mineral patent, is sufficient proof of citizenship under the statute. Rose Nos. 1 and 2 Lodes, 22 L. D. 83.

2. *Adverse Claims.*

(See ADVERSE, p. 284.)

19. Decisions of the Land Department are not binding on the courts in actions for the settlement of adverse claims brought under section 2326, United States Revised Statutes. Hartman v. Smith, 7 Mont. 19; 14 Pac. Rep. 648.

20. In an action upon an adverse claim, where plaintiffs, as evidence of their title, had introduced the receiver's receipt for the entry thereof, it is admissible for the defendants to prove by decisions of the Land Department that the receipt had been canceled and set aside on the protest against the issuance of patent. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

21. A decision of the local office "that the entry is held for cancellation, subject to the right of further appeal," is not, when offered in evidence upon trial of adverse suit, open to objection that it does not cancel, but merely recommends cancellation. The effect of a decision of this kind is not destroyed by the use of such language. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

22. The Land Department has no jurisdiction to determine or pass upon controversies between adverse claimants as to the right of possession of a mining claim, or upon any question as to the priority of such right. Bright v. Elkhorn M. Co., 8 L. D. 122.

23. "The Executive Department has no jurisdiction of adverse mineral claims, which, under the law, are adjudicated exclusively by the courts." Waterhouse v. Scott, 13 L. D. 718.

24. If an adverse claim is in proper form and is filed in time, the merits thereof is not a question for the Land Department, which under the law is bound to suspend action that the controversy may be settled in court. Valentine Gold Qtz. Mine, Sickel's Min. Dec. 287; King of the West Lode, Sickel's Min. Dec. 297; Ovens v. Stephens, 2 L. D. 699.

25. The merits of an adverse claim properly presented is not the proper subject of consideration by the Land Department, even though, on the face of the adverse filed in the local office, the adverse claimant appears to have no case. Bay State G. M. Co. v. Trevillion, 10 L. D. 194.

26. The sufficiency of an adverse claim filed in the land office may not be questioned by a court on adverse suit. Quigley v. Gillett, 101 Cal. 462; 35 Pac. Rep. 1040.

27. The merits of an adverse claim may not be inquired into by the Land Department, the assertion thereof in proper manner and institution of suit constituting a bar to any proceedings by the Land Department. (Sec. 2326, U. S. Rev. Stat.) Robinson v. Mayger, 1 L. D. 538.

28. "If no adverse claim is filed during the required period of publication, it is assumed that the applicant is entitled to patent, and no agreement of parties can control this statutory provision. If either party claims a nonfulfillment of such agreement by the other, the remedy must be found in the courts, and not before your office or this Department." Gustavus Hagland, 1 L. D. 591.

29. To be recognized by the Land Department under the provisions of section 2326, United States Revised Statutes, a suit must be based upon an adverse claim filed during the sixty days of publication of notice of application for patent, and must be commenced within thirty days after the filing of such adverse. Nettie Lode v. Texas Lode, 14 L. D. 180.

30. Where an adverse claim is filed, and suit instituted thereon, all proceeding before

the Land Department must be stayed, and the Land Department is not reinvested with jurisdiction by the filing by the applicant of a relinquishment of the ground covered by the adverse claim as presented before the Department, when it appears that the complaint filed in court has been so amended as to cover more land than shown by the adverse plat filed in the land office. Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391.

31. The applicant for patent cannot waive an adverse claim by excluding from his application the area covered by the adverse claim, and so vest the Land Department with jurisdiction to patent the remaining portion of his claim. The adverse claim can be waived only by one setting it up. But if the Land Department does so proceed there is no cause of complaint by the adverse claimant, and it is only a question between the Land Department and the applicant for patent. Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683. (Reversing 7 U. S. App. 463; 54 Fed. Rep. 284; 9 U. S. App. 613; 61 Fed. Rep. 557.)

32. Where an adverse claim is filed against an application for patent, the applicant may (1) suspend proceedings before the Land Department and litigate with the adverse claimant, (2) relinquish the ground in conflict from his application (litigating therefor) and take patent for the remainder of his claim, or (3) dismiss his application for patent in its entirety and continue to claim under his possessory title. Branagan v. Dulaney, 2 L. D. 744.

33. The question of whether or not an adverse suit has been prosecuted with reasonable diligence is one to be determined, not by the Land Department, but by the court having jurisdiction over the suit. Rose v. Richmond M. Co., 17 Nev. 25; 2 Colo. Law Rep. 7; 27 Pac. Rep. 1105. See S. C., 114 U. S. 576.

34. While a suit brought under the provisions of section 2326, United States Revised Statutes, is pending undetermined in court, it is not for the Land Department to decide whether or not suit has been prosecuted with reasonable diligence, and a patent issued by the Department during the pendency of such a suit involving the land, is issued without authority of law, is void, and may be attacked collaterally in a court of law. Richmond M. Co. v. Rose, 114 U. S. 576.

35. An adverse claimant who fails to institute suit thereby waives the right to set up before the Land Department matters properly determinable in court on an adverse suit. Southwestern M. Co. v. Gettysburg Lode, 4 L. D. 271.

36. A difference in the name (apparently through clerical error) of the adverse claimant as presented in the adverse claim filed in the local office, and as shown by proceedings in court, will not warrant the dismissal of the adverse by the Land Department. Bay State G. M. Co. v. Trevillion, 10 L. D. 194.

37. Although an adverse claim was defective in that it was sworn to (before the act of April 26, 1882, 22 Stat. 49) by the agent of the adverse claimants, action will be suspended by the Land Department if suit has been instituted thereon. Samuel McMaster, 2 L. D. 706.

38. Where two co-owners of a mining claim file an adverse claim against an application for patent, and institute separate suits thereon, in different courts, the Land Department will not allow entry upon the application, inclusive of the conflict, during the pendency of either of said suits. Black Queen Lode v. Excelsior No. 1 Lode, 22 L. D. 343.

39. No judgment of a court rendered after the filing of application will be considered binding upon the Land Department, save one rendered under the provisions of section 2326, United States Revised Statutes. Nichols v. Becker, 11 L. D. 8.

40. The Land Department will not undertake to settle controversies as to the rights of disputing mining claimants. Com'r to John Nutcher, Aug. 22, 1893.

41. A dispute between mining claimants, one claiming the land as a lode claim and the other as a placer claim, must be settled in court, as the determination of such controversies is not within the jurisdiction of the Land Department. Com'r to C. Dodson, April 10, 1891.

42. Where a placer patentee has filed an adverse claim against the application for patent for a lode claim within the placer and has begun suit thereon, the Land Department will take no action, but will leave the parties to secure a determination of their rights in court. Iron Silver M. Co. v. Mike & Starr M. Co., 6 L. D. 533.

43. A judgment rendered on an adverse suit awarding the surface of the ground involved to a placer claimant, and lodes therein contained to lode claimants, is without authority of law, and will not be followed by the Land Department, which will not issue a patent for a placer claim containing known lodes belonging to one other than the placer claimant. Apple Blossom Placer v. Cora Lee Lode, 14 L. D. 641.

44. The object and purpose of an action under section 2326, United States Revised Statutes, is not only to settle the controversy as between the claimants, but for the information of the officers of the Land Department, and to recover, either party must show *by proof* the right to a patent. An admission of material facts by the opposing party will not avail, but the facts must be *found*. Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324.

45. The judgment of a court to the effect that lands are mineral does not bind the Land Department, whose duty it is to determine for itself the character of the land to be disposed of. Barden v. N. P. R. R. Co., 19 L. D. 188.

46. The judgment rendered by the court upon an adverse suit is conclusive upon the Land Department only as to the right of possession, and does not relieve the Department from its duty of requiring proof of compliance with law by the adverse claimant. Alice Placer, 4 L. D. 314.

47. A judgment rendered upon an adverse suit awarding the land involved to the applicant does not preclude an investigation by the Land Department as to claimant's compliance with the law and a rejection of the application for patent if non-compliance is found. George H. Smith (Bull of the Woods Mill Site), 7 L. D. 415.

48. A judgment on an adverse suit is not conclusive upon the United States as to the character of the land involved, or as to the parties' compliance with law. Apple Blossom Placer v. Cora Lee Lode, 14 L. D. 641.

3. *Patent.*

(See PATENT, p. 266.)

49. The issuance of a patent for public land (even though erroneously) terminates the jurisdiction of the Land Department. United States v. Schurz, 102 U. S. 378; Steel v. St. Louis Sm. Co., 106 U. S. 447; Rockwell v. Indian Widows, 1 L. D. 90; Heir of John Love, 2 L. D. 386; Baker v. State of California, 4 L. D. 137; Wisconsin Central R. R. Co. v. Stinka, 4 L. D. 344; Pueblo of San Francisco, 5 L. D. 483; Garriques v. Atchison, Topeka & Santa Fe R. R. Co., 6 L. D. 543; The Middle Grounds, 7 L. D. 255; Schweitzer v. Ross, 8 L. D. 70; John P. S. Vogt, 9 L. D. 114; Louisa Goldstein, 10 L. D. 155; Plymouth Lode, 12 L. D. 513; Protector Lode, 12 L. D. 662; Pacific Slope Lode, 12 L. D. 686; Pikes Peak Lode, 14 L. D. 47 (modified in South Star Lode, 20 L. D. 204); South Star Lode, 17 L. D. 280 (modified, S. C., 20 L. D. 204); Spirlock v. N. P. R. R. Co., 22 L. D. 92.

50. The action of the Land Department in issuing a patent is conclusive as to the legal title. Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574.

51. The jurisdiction of the Land Department in issuing patents and the conclusiveness of such patents discussed at length. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673.

52. The issuance of patent for public land terminates the jurisdiction of the Land Department to inquire into the character thereof. Courtright v. Wisconsin Central Ry. Co., 19 L. D. 410.

53. The issuance of patent terminates the jurisdiction of the Land Department over the land covered thereby, and the patent can be invalidated only by judicial proceedings. Thomas J. Laney, 9 L. D. 83.

54. A patent issued by the officers of the Land Department carries with it all legal presumption in support of their action. Lee v. Johnson, 116 U. S. 48.

55. "When the patent has been executed by the President and recorded in the General Land Office, all power of the Executive Department over it has ceased," and title has passed, whether or not the patent has been delivered to the patentee. Bicknell v. Comstock, 113 U. S. 149.

56. A patent regularly issued and recorded passes title without delivery to the patentee, and terminates the jurisdiction of the Land Department. Schweitzer v. Ross, 8 L. D. 70.

57. "Until patent has issued, the Department has full and complete jurisdiction over all entries not confirmed by the statute, and

persons who purchase on the faith of the Receiver's receipt do so at their own risk and take the land subject to all the infirmities of title, so far as the government is concerned." Louise M. Co., 22 L. D. 662.

58. A patent issued upon a coal entry, which was made for land not claimed through error of description, may be surrendered to the Land Department, the land reconveyed to the government, proof furnished of non-alienation of the land patented, and the patent may be canceled and a new patent issued after amendment of the entry. Richard Gill, 8 L. D. 203.

59. A patent inadvertently issued, and not accepted by the patentee, may, with his consent, be canceled by the Land Department. Eastlake Land Co. v. Brown, 9 L. D. 322.

60. "The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court." Mullan v. United States, 118 U. S. 271. (Quoting approvingly, United States v. Stone, 2 Wall. 525.)

61. Land patents, in actions at law, are conclusive "of all matters of fact necessary to their issue, where the Department had jurisdiction to act upon such matters, and to determine them; but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale, or other disposition, or they had been reserved from sale, the Department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void, no matter with what seeming regularity the forms of law have been observed." Davis' Adm'r v. Weibbold, 139 U. S. 507. See 7 Mont. 107.

62. If the Land Department in issuing a patent acted without authority of law, or the lands patented were not within its jurisdiction, the patent is void and may be shown so to be in an action at law. Polk's Lessee v. Wendal, 9 Cranch, 87; Mayor, etc. v. United States, 10 Pet. 662; Wilcox v. Jackson, 13 Pet. 498; Stoddard v. Chambers, 2 How. 284; Easton v. Salisbury, 21 How. 426; Reichart v. Felps, 6 Wall. 160; Best v. Polk, 18 Wall. 112; Leavenworth, etc. R. R. Co. v. United States, 92 U. S. 733; Newhall v. Sanger. 92 U. S. 761; Sherman v. Buick, 93 U. S. 209; St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Steel v. St. Louis Sm. Co., 106 U. S. 447; U. P. R. R. Co. v. Dunmeyer, 113 U. S. 629; Reynolds v. Iron S. M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591; Doolan v. Carr, 125 U. S. 618; Hastings, etc. R. R. Co. v. Whitney, 132 U. S. 357; St. Paul, etc. R. R. Co. v. N. P. R. R. Co., 139 U. S. 18; Richmond M. Co. v. Rose, 114 U. S. 576; N. P. R. R. Co. v. Cannon, 7 U. S. App. 507.

63. A patent from the United States for land is conclusive in a court of law as to all matters properly determinable by the Land Department. If patent issued without jurisdiction it may be collaterally impeached. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645; Meyendorf v. Frohner, 3 Mont. 282; 5 Mor. Min. Rep. 56; Boggs v. Merced M. Co., 14 Cal. 279; 10 Mor. Min. Rep. 334; S. C., 3 Wall. 304.

64. A patent may be attacked collaterally by showing that the Land Department had no jurisdiction over the land patented. St. Louis Sm. Co. v. Kemp, 104 U. S. 636; 11 Mor. Min. Rep. 673; Wright v. Roseberry, 121 U. S. 488; Doolan v. Carr, 125 U. S. 618; Francoeur v. Newhouse, 40 Fed. Rep. 618; 43 Fed. Rep. 238.

65. The Land Department, in issuing a patent, must necessarily consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings. Steel v. St. Louis Sm. Co., 106 U. S. 447.

66. "The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof." United States v. Iron Silver M. Co., 128 U. S. 673. (Affirming S. C., 24 Fed. Rep. 568.)

67. If the officers of the Land Department mistake the law applicable to the facts or misconstrue the statute and issue a patent to one not entitled to it, the party wronged

can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. Lee v. Johnson, 116 U. S. 48; Puget Mill Co. v. Brown, 15 U. S. App. 274.

68. "Mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them. To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected, would have given him the patent." (Citing Bohall v. Dilla, 114 U. S. 47.) Sparks v. Pierce, 115 U. S. 408. See, also, Lee v. Johnson, 116 U. S. 48.

69. Should it appear to the satisfaction of the Land Department that a lode was known to exist within the limits of a placer claim at the date of application for patent for the placer, the lode with surface ground twenty-five feet in width on each side of the middle thereof may be patented notwithstanding the issuance of a placer patent. Shonbar Lode, 1 L. D. 551: 3 L. D. 388. See Pikes Peak Lode, 10 L. D. 200; South Star Lode, 20 L. D. 204.

70. An application for a lode claim in conflict with a patented placer may not be received by the Land Department as long as the placer patent remains outstanding. If the placer patent was issued upon false proof, suit to vacate the same should be brought by the United States. Pikes Peak Lode, 10 L. D. 200. (Overruled by South Star Lode Case, 20 L. D. 204.)

71. The question whether or not a lode was known to exist within a placer claim at date of the application for the placer patent is always one for an ultimate decision by the courts. After the Land Department has issued a patent for the placer claim its jurisdiction over the land patented has ceased, and the only way the title of the patentee can be impeached is by proper proceedings in court. Iron Silver M. Co. v. Campbell, 135 U. S. 286.

72. After the issuance of a placer patent the Land Department will not assume that a lode was known to exist within the placer claim because of the fact that a lode claim was located therein prior to the placer application. The known existence of the lode at that date must be shown as a fact by proof. Valley Lode, 22 L. D. 317.

73. In assuming to issue patent for a lode claim alleged to have been known at the date of application for a placer patent (since issued) covering the land, the Department will proceed with caution and will require the known existence of such lode at that date to be clearly shown. Departmental decision of May 13, 1896, *In re* Lucy L. Lode.

74. A placer patentee cannot be called upon to defend his title against a lode claimant before the Land Department. Iron Silver M. Co. v. Campbell, 135 U. S. 286.

75. The Land Department cannot except any part of the surface ground from the patent of a mining claim based on a prior location. If it does, its act to that extent is void, and it may be so declared in an action at law. Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574.

76. The Land Department cannot include in a town site patent any mine, mining claim or mining possession. If such is included in the patent, the same to that extent is void. Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574.

77. "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribes." Deffeback v. Hawke, 115 U. S. 392; Sparks v. Pierce, 115 U. S. 408.

78. "The officers of the Land Department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the condition which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservation of the officers of the Land Department, resting for their fitness only upon the judgment of those officers." Davis' Adm'r v. Weibbold, 139 U. S. 507. See 7 Mont. 107. (Citing Deffeback v. Hawke, 115 U. S. 392.)

79. Where the applicant for patent for a lode claim situate within a patented town site shows such lode to have been known at the date of the town site entry, he may procure a reconveyance of the conflict by the town site to the United States and thus reinvest the Land Department with jurisdiction to patent the claim. Pederson Lode v. Black Hawk Town Site, 14 L. D. 186.

80. A mineral patent renders *res judicata*, so far as the Land Department is concerned, the fact that the land was known to be mineral. Blackmore v. Reilly, 17 Pac. Rep. 72.

81. Where the possessory title to a mining claim becomes vested, either by location or transfer, in one who dies before applying for a patent, if application and entry are made by the heirs, devisees, executor or administrator, patent will be issued in the name of the decedent, the Land Department refusing to pass upon the title of those claiming under the decedent. Com'r to Helena Office, March 25, 1896, Broadwater Placer.

82. In a controversy as to ownership of the vein on the dip, issuance of patent does not prove the correctness of the Land Department record as to the date of location, but this must be proven as any other matter would be. Champion M. Co. v. Cons. Wyoming G. M. Co., 75 Cal. 78; 16 Pac. Rep. 513; Last Chance M. Co. v. Tyler M. Co., 61 Fed. Rep. 587; 9 U. S. App. 612; Kahn v. Old Telegraph M. Co., 2 Utah, 174; 11 Mor. Min. Rep. 645.

83. The grantee of an entryman before issuance of patent takes no better title than his grantor and cannot pose before the Land Department as an innocent purchaser. R. M. Chrisinger, 4 L. D. 347.

4. *Patent, Vacation of.*

84. Clear and convincing proof must be presented to warrant the Land Department in recommending suit to vacate a patent for fraud. Butte & Boston M. Co., 21 L. D. 125.

85. Fraud to set aside a patent must be fraud extrinsic to the matter tried in the Land Department. United States v. White, 17 Fed. Rep. 561; United States v. San Jacinto Tin M. Co., 23 Fed. Rep. 279. (Affirmed, see 125 U. S. 273.) The representations must have been falsely and fraudulently made. A mistake as to the character of the land will not suffice. United States v. Iron Silver M. Co., 24 Fed. Rep. 568. (Affirmed, see 128 U. S. 673.)

86. Proceedings to vacate a patent will only be recommended by the Land Department upon a clear showing that it was erroneously issued. James D. Negus, 11 L. D. 32.

87. A petition addressed to the General Land Office, asking that suit be brought to vacate a patent, should be forwarded to the Department with a recommendation as to the advisability of ordering a hearing preliminary to the recommendation of such suit. Butte & Boston Mining Co., 21 L. D. 125.

88. Suit will be recommended by the Land Department to vacate a patent procured by fraud, where such action is necessary to protect the rights of a third person. Mountain Maid Lode, 5 L. D. 28.

89. The Land Department will recommend to the Department of Justice that suit be instituted to vacate a patent issued through inadvertence and mistake to the prejudice of another. Lead City Town Site v. Little Nell Lode, 17 L. D. 291.

90. Suit to vacate a mineral patent will not be recommended by the Land Department when the petition therefor is based upon allegations of an adverse claim which might have been properly asserted. Thomas Starr, 2 L. D. 759.

91. Suit to vacate a patent for fraud in its procurement will not be recommended by the Land Department where the fraud is not clearly shown and the land has passed into the hands of a *bona fide* purchaser. G. T. Dickinson, 10 L. D. 449.

92. Suit to vacate a patent for fraud in its procurement will not be recommended by the Land Department where the land has passed into the hands of one not shown to have taken with notice of the fraud. William W. Wilson, 6 L. D. 395.

93. Suit to vacate a patent will not be recommended by the Land Department on the ground of fraud, unless the showing thereof is clear and specific. Thomas Starr, 2 L. D. 759.

94. A bill in chancery brought in the name of the United States to vacate a patent cannot be made to serve as a writ of error, or as a motion for a new hearing, or as a motion for a new trial of the case as decided by the Land Department. United States v. Marshall M. Co., 129 U. S. 579.

95. The Supreme Court does not interfere with the title of a patentee on an alleged mistake of fact, or from wrong conclusions drawn from the testimony by the Land Department. It is only a case of fraud that will warrant a court in looking into the evidence. Lee v. Johnson, 116 U. S. 48.

96. Where an applicant for a lode patent shows the lode to have been known at date of application for a patented placer with which it conflicts, instead of incurring the expense of suit by the United States to vacate the placer patent as to the conflict, the Land Department may accept a reconveyance of the land to the United States, which would reinvest the Department with jurisdiction over it. Juniata Lode, 13 L. D. 715.

97. An applicant for a patent to a lode claim in a patented town site may, upon making a proper showing, be allowed a hearing to prove the known existence of the lode at date of the town site entry, with view to the recommendation by the Land Department of suit to vacate the town site patent as to the conflict. Thomas J. Laney, 9 L. D. 83.

98. If land known to be valuable for mineral is patented to a railroad company under a grant excepting mineral lands, the United States has such interest in the matter as would warrant the Secretary of the Interior in recommending suit to vacate patent. Bullock v. C. P. R. R. Co., 11 L. D. 590.

99. Where a mineral patent issues based on an erroneous survey, a new patent in lieu thereof may not be issued without new notice based on a correct survey, where the original survey is so erroneous as not to cover any portion of the claim. If such patentee refuses to surrender the erroneous patent and to reconvey the land covered thereby, suit to vacate the patent will be recommended by the Land Department. United States v. Rumsey, 22 L. D. 101.

100. A patent cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves. Steel v. St. Louis Sm. Co., 106 U. S. 447.

5. *Cancellation.*

101. The Land Department has no authority to cancel an entry for fraud. The government must seek relief in court. Smith v. Ewing, 11 Sawy. 56; 23 Fed. Rep. 741; Wilson v. Fine, 14 Sawy. 224; 40 Fed. Rep. 52.

102. The Land Department may not cancel an entry even on contest had. Smith v. Ewing, 11 Sawy. 56; 23 Fed. Rep. 741; Wilson v. Fine, 14 Sawy. 224; 40 Fed. Rep. 52; Stimson v. Clark, 45 Fed. Rep. 760; American Montana Co. v. Hopper, 48 Fed. Rep. 47. But see Cornelius v. Kessel, 128 U. S. 456.

103. The Land Department may inquire into the validity of an entry and may cancel it if improperly allowed. German Insurance Co. v. Hayden, 40 Pac. Rep. 453. See sub-title, Commissioner of the General Land Office.

104. The cancellation of an entry without service on the claimant by the Land Department is void. Young v. Hanson, 64 N. W. Rep. 654.

105. Where, after publication of notice of application for patent and before entry, a mining claim is relocated by a stranger, for failure on part of the applicant to make the required annual expenditure, and such failure and relocation are shown at a hearing, the entry will be canceled and the parties left to litigate their conflicting claims in court. The Land Department will not pass upon the validity of the relocation in such a case. Little Pauline Lode v. Leadville Lode, 7 L. D. 506.

106. Where a claim has been applied for and subsequently forfeited, a relocator who desires to apply for a patent should secure the cancellation of the existing application by the Land Department. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292.

107. A coal entry should not be canceled for failure to furnish proof not required by the Land Department regulations at date of entry. Durango Land & Coal Co., 18 L. D. 382.

108. The transferee of a coal entryman, prior to issuance of patent, takes no greater right than his grantor had, *i. e.*, an equitable title, and the entry is subject to cancellation by the Land Department just as though no transfer had been made. Scott v. Sheldon, 15 L. D. 588. (On review.)

6. *Secretary of the Interior.*

(See also COMMISSIONER OF THE GENERAL LAND OFFICE.)

109. The Secretary of the Interior is charged (among other things) with the supervision of public business relating to the pub-

lic lands, including mines. (Sec. 441, U. S. Rev. Stat.) Knight v. United States Land Ass'n, 142 U. S. 161.

110. "The secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands." Knight v. United States Land Ass'n, 142 U. S. 161.

111. The Secretary has supervisory power over the Commissioner of the General Land Office. Maguire v. Tyler, 1 Black, 195; S. C., 8 Wall. 650; Snyder v. Sickels, 98 U. S. 203; Buena Vista County v. Iowa Falls & S. C. R. R. Co., 112 U. S. 165; Lee v. Johnson, 116 U. S. 48; Williams v. United States, 138 U. S. 514; Knight v. United States Land Ass'n, 142 U. S. 161; Orchard v. Alexander, 157 U. S. 372; Pierce v. Frace, 157 U. S. 372; Sweigart v. Walker, 30 Pac. Rep. 162.

112. A petition asking the Secretary of the Interior to recommend suit to vacate a land patent will not be considered if not served upon the one claiming under the patent. Little Nell Lode, 16 L. D. 104.

113. "All cases presented to the Department of the Interior are to be heard and determined by the Secretary without regard to any legislation which it may be imagined or suggested will take place," but if the decision of a case depends upon the determination of a question pending before the United States Supreme Court, action by the Department may properly be stayed to await the judgment of the court. Attorney General to Secretary of the Interior, Nov. 12, 1877, *In re* McGarrahan v. New Idria M. Co., 4 C. L. O. 130.

114. The decision of the Secretary of the Interior or the Commissioner of the General Land Office of cancellation of an entry takes effect from date of its rendition, not from its receipt by local officers and notation on their records. McDonald v. Hartman, 19 L. D. 547.

115. A decision of the Secretary affirming the judgment of cancellation by the Commissioner is a judgment of cancellation. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

7. *Commissioner of the General Land Office.*

(See also SECRETARY OF THE INTERIOR.)

116. "The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for." Sec. 2478, U. S. Rev. Stat. (This section forms a part of Title XXXII, U. S. Rev. Stat., The Public Lands.)

117. The Commissioner of the General Land Office exercises supervisory authority over registers and receivers of local land offices. Sweigart v. Walker, 30 Pac. Rep. 162.

118. "The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all (*agents*) [grants] of land under the authority of the government." (Sec. 453, U. S. Rev. Stat.) Knight v. United States Land Ass'n, 142 U. S. 161.

119. "The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for." (Sec. 2478, U. S. Rev. Stat.) Knight v. United States Land Ass'n, 142 U. S. 161.

120. The Commissioner of the General Land Office has authority to cancel an entry illegally allowed. "The exercise of this power is necessary to the due administration of the Land Department. If an investigation of the validity of such entries were required in the courts of law, before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the Department." Cornelius v. Kessel, 128 U. S. 456.

121. The Commissioner of the General Land Office may cancel an entry. Barnard's Heirs v. Ashley's Heirs, 18 How. 45; Bell v. Hearne, 19 How. 252; Harkness v. Underhill, 1 Black, 316; Marquez v. Frisbie, 101 U. S. 473; United States v. Schurz, 102 U. S. 378;

Steel v. St. Louis Sm. Co., 106 U. S. 447; Ferry v. Street, 11 Pac. Rep. 571; Darcy v. McCarthy, 12 Pac. Rep. 104; Pierce v. Frace, 26 Pac. Rep. 192. (See 157 U. S. 372.) Jones v. Meyers, 2 Idaho, 794; 26 Pac. Rep. 215; Hestres v. Brennan, 50 Cal. 211; Judd v. Randall, 29 N. W. Rep. 589; Forbes v. Driscoll, 31 N. W. Rep. 663; Vantongeran v. Hefferman, 38 N. W. Rep. 52; Randall v. Edert, 7 Minn. 450; Gray v. Stockton, 8 Minn. 529.

122. The Commissioner of the General Land Office may cancel an entry based on fraudulent proof before patent, even if it has been assigned to a third person. Jones v. Meyers, 2 Idaho, 794; 26 Pac. Rep. 215; Parsons v. Venzke, 4 N. Dak. 452; 61 N. W. Rep. 1036.

123. In requiring an amended survey of an entered mining claim, the General Land Office should direct that claimant be allowed a certain time within which to take proper steps, under penalty of cancellation of the entry. Vanderbilt Lode, 16 L. D. 105.

124. If the General Land Office holds an entry for cancellation on insufficient grounds, and cancels it on failure of claimant to appeal, the rights of entryman are lost if another right attaches after cancellation. Roberts v. Gebhart, 104 Cal. 67.

125. An order of the Commissioner of the General Land Office canceling an entry on a contest to which entryman has not been cited as required by Department practice is a nullity. Risdon v. Davenport, 4 S. Dak. 555.

126. A mineral entry should not be canceled on the report of a special agent that claimant has not complied with the law, and that the mining claim is valueless as such, but a hearing should be ordered by the General Land Office. Franklin L. Bush, 2 L. D. 788.

127. The mutilation (without the consent and against the protest of the grantee) of a patent for public land, by the Commissioner of the General Land Office, after its due execution and recordation, and a mutilation of the record, cannot affect the validity or force of the patent. Bicknell v. Comstock, 113 U. S. 149.

128. Where notice of application for patent was not published for the required period and the General Land Office ordered republication on that account, without questioning the sufficiency of the notice, and the same notice is thereupon published for the proper period, republication should not again be required for a defect in said notice. Mimbres M. Co., 8 L. D. 457.

129. A claimant under a Mexican grant must protect his rights by filing an adverse claim and instituting suit thereon. If he fails so to do he can appear only as a protestant, and as such has no right of appeal from a decision of the General Land Office dismissing his protest. McGarrahan v. New Idria M. Co., 8 L. D. 422.

130. Where a mineral entry has been allowed after due notice of application for patent, a protestant who admits the sufficiency of such notice appears solely as *amicus curiæ*, without right of appeal from a decision of the General Land Office dismissing his protest. Bright v. Elkhorn M. Co., 8 L. D. 122; Departmental decision of August 15, 1896, *In re* Johnson v. Beaufort.

131. An adverse claimant is not barred from asserting his claim by the allowance of entry without legal notice of application for patent, and where he sets up such an allegation of non-compliance with law in a protest, he has such an interest as entitles him to appeal from the action of the General Land Office dismissing his protest. Bright v. Elkhorn M. Co., 8 L. D. 122.

132. If a suit to determine the right of possession to a mining claim is pending at the time of publication of notice of application for patent therefor by one of the parties, it is not necessary that the other party should file an adverse claim, but he need only show the pendency of said suit to procure a stay of proceedings before the land office. Northwestern Lode and Mill Site Co., 8 L. D. 437.

(For exemplifications of papers, see MISCELLANEOUS, p. 461.)

8. *Register and Receiver.*

133. A register may not act as an attorney in a case before the land office. United States v. Waitz, 3 Sawy. 473; 4 Mor. Min. Rep. 205.

134. The register of a land office, who acts as attorney for a mineral applicant for patent and charges more than his legal fees for services in the matter, is guilty of extortion under section 5481, United States Revised Statutes. United States v. Waitz, 3 Sawy. 473; 4 Mor. Min. Rep. 205.

135. A clerk in a local land office is an employee of the General Land Office within the meaning of section 452, United States Revised Statutes, prohibiting officers, clerks or employees from acting as attorneys. Sharritt v. Wood, 11 L. D. 25.

136. Courts will not interfere with the exercise by executive officers of the government of political or discretionary power. The register and receiver of the land office are required to exercise a judicial judgment and discretion, and their action relating to the disposal of public lands will not be interfered with by *mandamus* or injunction. Litchfield v. Register & Receiver, 1 Woolworth, C. C. Rep. 299. (Affirmed, 9 Wall. 575.) See, also, Mississippi v. Johnson, 4 Wall. 498; Koehler v. Barin, 25 Fed. Rep. 161.

137. A mineral application tendered at the local land office, but not filed because of the temporary absence of the register, operates to segregate the land covered thereby, and bars the subsequent filing of an application for the same land by another pending action by the register. Rice v. Redding, 11 L. D. 213.

138. Where a second application is allowed for land embraced in a prior application, by reason of the fact that the survey showed no conflict, and the second applicant, being misled by the action of the land office, failed to adverse the first application, such second application may be treated as an adverse claim (and the second applicant in this case was allowed thirty days from the decision within which to begin suit). Hall v. Street, 8 L. D. 40.

139. Suit must be commenced upon an adverse claim within thirty days from date of filing of the adverse claim in the land office, and the running of said time is not stayed by a decision of the local office dismissing the adverse claim and an appeal from said decision by the adverse claimant. Scott v. Maloney, 22 L. D. 274.

140. Publication of notice of application for mineral patent under the direction of the receiver of the land office, during a vacancy in the office of register, is the act of a *de facto* officer, and is not invalid, and failure to adverse such application during such publication is a waiver of adverse rights. Jeffords v. Hine, 11 Pac. Rep. 351; 15 Mor. Min. Rep. 575.

141. Where the register of the land office was suspended and the receiver was directed to take charge of the office and received a mineral application and directed publication of notice thereof, his acts were those of an officer *de facto*, acting *colore officii*, and will be held valid. Dean Richmond Lode, 1 L. D. 545.

142. In designating a newspaper for the publication of notice of a mineral application, the register is not required to recognize the difference in distance from the claim between two papers published in the same city or town. Condon v. Mammoth M. Co., 15 L. D. 330.

143. In designating a newspaper as being the one of general circulation published nearest the land, the register has a judicial discretion, subject, however, to the supervisory authority of the General Land Office and Department of the Interior. Condon v. Mammoth M. Co., 15 L. D. 330.

144. The register may exercise an official discretion in the designation of a paper for the publication of notice of a mineral application, and if the one published nearest the claim will not give publicity to the notice, another paper, in which the publication will effect the object of the law, may be designated. Tomay v. Stewart, 1 L. D. 570. See, also, Erie Lode v. Cameron Lode, 10 L. D. 655.

145. The register may exercise a legal discretion in designating the newspaper of general circulation published nearest a mining claim. (Lead City is nearer the land than Deadwood, but a mountain rises between Lead City and the claim.) *Held*, that the publication in the Deadwood paper was proper. Bretell v. Swift, 16 L. D. 178.

146. The selection of a newspaper for publication of a notice of application for a mining claim rests in the sound discretion of the register. Other things being equal, the convenience of the applicant should be regarded. W. A. Arnold, 2 L. D. 758.

147. Any defect in the published notice of application for a mineral patent is chargeable to the register, whose duty it is to prepare and publish the same, and an entry may be referred to the Board of Equitable Adjudication, where such notice is defective in failing to connect the claim with a corner of the public surveys or a United States mineral monument. Mimbres M. Co., 8 L. D. 457.

148. Proof of posting of notice of application for patent in the local land office should

be furnished by the register, but if not furnished by him the claimant may submit evidence upon the point. Mimbres M. Co., 8 L. D. 457.

149. A mineral entry should not be canceled because the entrymen claim by transfer from a local land officer, by whom the claim was located, where the entryman and the officer acted in good faith. No opinion expressed as to the legality of such a location. Rust and Criteser, 2 L. D. 754.

150. Application for patent may be filed and mineral entry made by the receiver, before his own office, where, prior to his appointment as such officer, he had acquired possessory title to a mining claim, for himself and as trustee for others, as to apply section 452, United States Revised Statutes, would deprive the *cestui que trustent* of the patent to which they are entitled. Com'r to Jeremiah Collins, Receiver, Helena Office, Aug. 21, 1896.

151. Public land cannot be considered as having been surveyed until the plat thereof has been filed in the local land office. Buxton v. Traver, 130 U. S. 232.

152. A hearing to determine the character of the land covered by a mineral application, and the question of compliance with the law by the applicant, may be ordered by the local land office on protest filed. Devereux v. Hunter, 11 L. D. 214.

153. Where parties have acquiesced for eight years in a decision of the local land office dismissing their application for a mineral patent, and the land has meantime been patented to another, they have no standing in a court of equity for the purpose of attacking the patent. United States v. Marshall M. Co., 129 U. S. 579.

9. *Surveyor General — Deputy Mineral Surveyor.*

(See SURVEY, p. 137.)

154. An employee in the office of the Surveyor General is an employee of the General Land Office, within the meaning of section 452, United States Revised Statutes, prohibiting officers, clerks or employees from acting as attorneys. Herbert McMicken, 11 L. D. 96.

155. The matter of the appointment of United States Deputy Mineral Surveyors is a matter in which the discretion of the United States Surveyor General will be recognized. William E. Jacobs, 21 L. D. 879.

156. The action of the Surveyor General in suspending or revoking the appointments of United States Deputy Mineral Surveyors should be submitted by the Surveyor General to the General Land Office. Robert Gorlinski, 20 L. D. 283.

157. A Deputy Mineral Surveyor may hold a commission in more than one State. Charles W. Helmick, 20 L. D. 163. (Overruling S. C., 18 L. D. 601.)

158. A Deputy Mineral Surveyor need not be a resident of the land district for which he is appointed, and may hold more than one appointment. Charles W. Helmick, 20 L. D. 163.

159. Surveyors who are under contract to survey public land should not be commissioned, "but should receive an appointment for the execution of each contract." This does not apply to Deputy Mineral Surveyors. Com'r to Surveyor General of California, March 24, 1886. (Report of General Land Office of 1886, p. 280.) Com'r to Surveyor General of New Mexico, Oct. 14, 1892.

160. A Deputy Mineral Surveyor is required to give a bond in the sum of $10,000 for the faithful performance of his official duties. This bond must be approved by the Commissioner of the General Land Office. Circular of Nov. 13, 1877, Copp's Min. Lands (2d ed.), 61; 5 C. L. O. 85.

161. A bondsman of a Deputy Mineral Surveyor should not be allowed to arbitrarily disclaim further responsibility for the acts of the deputy, but the deputy should be allowed to furnish a new bond. Com'r to Surveyor General of Montana, Sept. 10, 1894. See, also, 7 Op. Att'y Gen. 62.

162. A Deputy Mineral Surveyor may make mineral land entries, but in that event he cannot act in any other capacity than a claimant. A Deputy Mineral Surveyor cannot survey a claim and act as notary public in the same case. Dennison & Willits, 11 C. L. O. 261.

163. A mineral entry may be made by a United States Deputy Mineral Surveyor within the land district for which he is appointed. Lock Lode, 6 L. D. 105.

164. A Deputy United States Surveyor, under contract to survey public land for the

government, is prohibited by section 452, United States Revised Statutes, from making an entry of public land. Müller v. Coleman, 18 L. D. 394.

165. A Deputy Mineral Surveyor should not take contracts to survey and secure patents for mining claims, as he should not act in the double capacity of surveyor and attorney in the same case. Com'r to Surveyor General of Montana, March 29, 1892.

166. The United States Deputy Mineral Surveyor by whom a mineral survey is made should not appear in the case in any other capacity, not even as notary public. Dennison & Willits, 11 C. L. O. 261; Clinton Gurnee, 18 L. D. 608.

167. There is no objection to the holding by a Deputy Mineral Surveyor of the office of notary public under the local authority, but by the rulings of this office, based on considerations of public policy, the Deputy who surveys a mining claim in the employ of the claimant is not permitted to act also as notary public in matters pertaining to the same claim. Com'r to Surveyor General of Montana, Jan. 20, 1890, 16 C. L. O. 269.

168. The report of the United States Deputy Mineral Surveyor should show the value of improvements placed upon the claim by claimants or their grantors. Improvements made by other parties should not be credited to the claim. Circular of Nov. 20, 1878, 1 C. L. O. 18.

169. Instructions to Deputy Mineral Surveyors in States where the Commissioner of the General Land Office is *ex officio* surveyor general. Smith Scogin, 2 C. L. O. 84.

170. A United States Deputy Mineral Surveyor who is found to be incompetent or careless in the performance of his duties should be dropped from the rolls. Com'r to Surveyor General of Montana, May 7, 1892.

171. If an amended survey or a resurvey is required through the fault of a United States Deputy Mineral Surveyor, he should bear the expense thereof. Com'r to Surveyor General of Colorado, July 30, 1895.

172. The applicant for a mineral survey should be required to deposit only the sum necessary to defray expenses of work in the office of the United States Surveyor General, not for the work of the United States Deputy Mineral Surveyor by whom the survey is to be made. George B. Foote, 2 L. D. 773.

10. *General.*

173. A discovery of a vein or lode of mineral-bearing rock in place is a prerequisite to a valid location, and failure to make such discovery may be set up before the Land Department by one who has failed to file an adverse claim. Waterloo M. Co. v. Doe, 17 L. D. 111.

174. The Land Department can take no judicial cognizance of the location of mining claims, as no record thereof is kept by it. Bodie T. & M. Co. v. Bechtel Cons. M. Co., 1 L. D. 584.

175. The failure to perform annual assessment work according to law may be waived by the Department, even in the face of an adverse relocation, if such failure occurred through the mistake of a *bona fide* claimant. Stewart v. Reeves, 21 L. D. 446 (Jaw Bone Lode).

176. The rejection by the Land Department of an application for patent to a mining claim cannot affect the possessory right of the applicant. Clipper Mining Co., 22 L. D. 527.

177. Publication of notice of application for a mineral patent in a weekly paper requires ten insertions, but where only nine were made in accordance with the former practice of the Land Department, the entry may be referred to the Board of Equitable Adjudication for confirmation, in the absence of any adverse rights. Oro Placer, 11 L. D. 457.

178. A legal entry of public land vests the equitable title thereto in the entryman, the United States thereafter holding the legal title in trust for the entryman until a patent issues, and this right cannot be defeated by an order of the Land Department, issued without warrant of law, canceling the entry. Cornelius v. Kessel, 128 U. S. 456.

179. A survey made by the proper officer of the United States, and approved by the Land Department, is not subject to collateral attack. Russell v. Maxwell Land Grant Co., 158 U. S. 253.

180. The power to make or correct surveys of the public lands is vested only in the Land Department, and its action is unassailable in the courts except in direct proceedings. Knight v. United States Land Ass'n, 142 U. S. 161.

181. The Land Department has exclusive jurisdiction in the matter of the survey of public lands, and its decisions are unassailable in the courts except in a direct proceeding. Haydel v. Dufresne, 17 How. 23; Cragin v. Powell, 128 U. S. 691.

182. The Land Department will not order a hearing to determine the character of land unless an application to enter the same is made. Central Pacific R. R. Co., 8 L. D. 30; 9 L. D. 613.

183. A decision as to the character of the land does not bar a subsequent investigation thereof by the Land Department. Searle Placer, 11 L. D. 441.

184. The value of mineral discovered in a mining claim will not be inquired into by the Land Department except in a controversy between mineral and agricultural claimants as to the character of the land. Tam v. Story, 21 L. D. 440.

185. For good reasons the Land Department will expressly authorize the filing of a second coal declaratory statement, and where entry has been made, based on a second declaratory statement, the filing thereof may be authorized *nunc pro tunc*. John McMillan, 7 L. D. 181.

186. The holder of a mining claim upon which trespasses are committed should protect himself by an action before the local courts, as the Land Department is powerless to give relief. Com'r to H. Clendenen, June 24, 1891.

187. The Land Department cannot interfere in disputes between miners as to the affairs of a mining district. Its sole duty is to recognize the local laws when not in conflict with statutes, State and National. Com'r to J. N. Barker, Jan. 9, 1892.

188. The regularity and legality of forfeiture proceedings against alleged delinquent co-owners under section 2324, United States Revised Statutes, will not be questioned by the Land Department if such co-owners fail to protect their rights under section 2326, United States Revised Statutes. Grampian Lode, 1 L. D. 544.

189. A co-owner of a mining claim who is not joined with the other owners in an application therefor must, to be recognized by the Land Department, protect his rights by filing an adverse claim under section 2326, United States Revised Statutes. Grampian Lode, 1 L. D. 544; Monitor Lode, 18 L. D. 358. *Contra*, Turner v. Sawyer, 150 U. S. 578; Brunby v. Mayfield, 38 Pac. Rep. 1067.

190. It is presumed by the Land Department, in the absence of a contrary showing, that the lode extends in a straight line through the center of a surveyed claim. Bimetallic M. Co., 15 L. D. 309.

191. Until a rule of the Land Department is changed it has all the force of law, and a change does not render illegal any acts performed in accordance with the then existing rule. Miner v. Mariott, 2 L. D. 709.

192. An injunction will not issue to restrain the exercise of official discretionary action. Mississippi v. Johnson (President). 4 Wall. 498; Litchfield v. Register & Receiver, 9 Wall. 575; Koehler v. Barin, 25 Fed. Rep. 161.

193. *Mandamus* will not issue against a land officer to compel discretionary action. Marquez v. Frisbie, 101 U. S. 413. See, also, Decatur v. Paulding, 14 Pet. 497; United States v. Guthrie, 17 How. 284; United States v. Conner, 5 Wall. 563; Litchfield v. Register & Receiver, 9 Wall. 575; Carrick v. Lamar, 116 U. S. 423.

194. The act of February 25, 1895 (28 Stat. 683), providing for the classification of lands within the grant to the Northern Pacific Railroad Company with respect to their mineral or non-mineral character, does not suspend the authority of the Land Department to pass upon pending cases involving that question, nor does it withdraw such lands from appropriation and entry. Sweeney v. N. P. R. R. Co., 21 L. D. 65.

195. An affidavit of citizenship made by a mineral claimant is not only good evidence under the law before the Land Department, but in any proceeding based on chapter 6, title XXXII, United States Revised Statutes. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 503. (Motion for new trial.)

196. The naturalization of an alien by a court not having a clerk will not be recognized by the Land Department. J. F. Hechtman, 1 L. D. 61. (Overruled in Joseph Barber, 1 L. D. 83.)

197. All officers, clerks and employees in the office of the Surveyors General, the local land offices and the General Land Office, or any persons, wherever located, employed under the supervision of the General Land

Office, are, during such employment, prohibited from entering or becoming interested in, directly or indirectly, any public lands of the United States. Circular of Sept. 15, 1890, 11 L. D. 348.

198. The construction of law by the Land Department is of weight in the courts only when there is an ambiguity in the statute. Northern Pacific R. R. Co. v. Sanders, 47 Fed. Rep. 604.

199. A decision of the Land Department is not reviewable in the courts except for errors of law or in case of fraud. Iron Silver M. Co. v. Campbell, 17 Colo. 267; 29 Pac. Rep. 513. See S. C., 135 U. S. 286.

PARTITION.

1. The right to a mining claim held by possessory title is such property as may be made the subject of partition. Gillett v. Gaffney, 3 Colo. 351; Sears v. Taylor, 4 Colo. 38; Filmore v. Reithman, 6 Colo. 124; McKeon v. Bisbee, 9 Cal. 137; 2 Mor. Min. Rep. 309; Watts v. White, 13 Cal. 324; Merritt v. Judd, 14 Cal. 59; Lowe v. Alexander, 15 Cal. 302; Hughes v. Devlin, 23 Cal. 501; 12 Mor. Min. Rep. 241; Spencer v. Winselman, 42 Cal. 479; Dall v. Confidence S. M. Co., 3 Nev. 531; Aspen M. & Sm. Co., 28 Fed. Rep. 220 (Colo.).

2. Possessory title to a mining claim is not such a title as may be made the subject of a bill for partition, unless so provided by a State statute, in which case the bill should be filed in a State court. Strettell v. Ballou, 3 McCrary, 46.

PARTNERSHIP.

1. One who claims under a location may not defeat the right of one of the locators to a share of the proceeds of the mine by alleging alienage of such locator. Billings v. Aspen M. & Sm. Co., 52 Fed. Rep. 250.

2. Tenants in common who unite to work a claim are for this purpose partners and may bind each other as such. Skillman v. Lachman, 23 Cal. 198; Duryea v. Burt, 28 Cal. 569; Dougherty v. Creary, 30 Cal. 300; Settembre v. Putnam, 30 Cal. 493; Charles v. Eshleman, 5 Colo. 107; Manville v. Parks, 7 Colo. 128; 2 Pac. Rep. 212; 15 Mor. Min. Rep. 565; Higgins v. Armstrong, 10 Pac. Rep. 232.

3. A partnership which exists between coowners or co-lessees who work a mining claim in common is a particular and limited one. Meagher v. Reed, 24 Pac. Rep. 681; Crawshaw v. Maule, 1 Swanst. 495; Fereday v. Wightwick, 1 Russ. & M. 45; Williams v. Attenborough, 1 Turn. & R. 70; Dickinson v. Valpy, 10 B. & C. 128; Charles v. Eshleman, 5 Colo. 107; Manville v. Parks, 7 Colo. 128; 2 Pac. Rep. 212; 15 Mor. Min. Rep. 565; Skillman v. Lachman, 23 Cal. 198; Duryea v. Burt, 23 Cal. 569; Kahn v. Central Smelting Co., 102 U. S. 641; Bissell v. Foss, 114 U. S. 252; Lamar v. Hale, 79 Va. 147; Rock on Mines, 574.

4. Where several tenants in common unite and co-operate in working a mine, they form what is termed a mining partnership, and are governed by rules relating to ordinary partnership, and also rules peculiar in themselves, one of which is that one person may convey his interest in the mine and business without dissolving the partnership. Skillman v. Lachman, 23 Cal. 198; Kahn v. Central Sm. Co., 102 U. S. 641.

5. A *delectus personæ*, which is essential to constitute an ordinary partnership, has no place in mining associations. Duryea v. Burt, 28 Cal. 569; Settembre v. Putnam, 30 Cal. 493; Taylor v. Castle, 42 Cal. 367; Kahn v. Central Sm. Co., 102 U. S. 641.

6. As to what constitutes a mining partnership, see Duryea v. Burt, 28 Cal. 569; Dougherty v. Creary, 30 Cal. 290.

7. One of several mining partners may withdraw without dissolving the partnership, but he may sue for his share of the product of the mine. Slater v. Haas, 25 Pac. Rep. 1089.

8. After the termination of an agreement to prospect for and locate mining claims, none of the parties are bound to perfect incomplete locations for the benefit of others, but may do so for themselves. Page v. Summers, 70 Cal. 121; 12 Pac. Rep. 120; 15 Mor. Min. Rep. 617.

9. A. and B. are mining and prospecting partners. A discovery is made, but no location. After dissolution of partnership, A. makes a location. *Held*, that B. has no interest in this location. Page v. Summers, 70 Cal. 121; 12 Pac. Rep. 120; 15 Mor. Min. Rep. 617; McLaughlin v. Thompson, 29 Pac. Rep. 816.

10. The possession of one partner or tenant in common of a mining claim is the possession of all. Waring v. Crow, 11 Cal. 366; 5 Mor. Min. Rep. 204.

11. An agreement between a miner and a mill owner, whereby the miller is to take $25 per ton out of proceeds for milling, and then the miner is to take cost of mining, thereafter any surplus being divided between them, does not constitute the miner and miller partners. Vietti v. Nesbitt, 41 Pac. Rep. 151.

12. A. gives B. an undivided interest in a right to mine a claim. This is not real estate, which is properly subject to a suit for partition. It makes A. and B. qualified partners. Any action must be based on this fact. Smith v. Cooley, 2 Pac. Rep. 880; Wheeler v. West, 11 Pac. Rep. 871.

13. Partnership is not constituted by an agreement of A. to pay B. wages and to give him an interest for a discovery of a paying mine. Berry v. Woodburn, 107 Cal. 504; 40 Pac. Rep. 802.

14. A contract to work a claim on shares does not constitute the owner and the operator partners. Stuart v. Adams, 26 Pac. Rep. 970.

15. Partnership is not formed by a mere agreement to acquire a mining lease for the purpose of working a claim as partners. Meagher v. Reed, 24 Pac. Rep. 681.

16. Death or bankruptcy of one of the members of a mining partnership does not dissolve such partnership. Kahn v. Central Sm. Co., 102 U. S. 641.

17. In the absence of a special contract there is no relation of trust between tenants in common of mining property, who are partners only for the purpose of developing the same, which prevents one from receiving a higher sum for his interest than the others. Harris v. Lloyd, 11 Mont. 390; 28 Pac. Rep. 736.

18. Co-tenants of a mining claim are partners for the purpose of working the claim, but may sell their interests to any one else, whereupon the grantee would become a partner. First National Bank v. Bissell, 4 Fed. Rep. 694.

19. The agreement of a mortgagor to apply the proceeds of a claim on a mortgage does not constitute a partnership between the mortgagor and the mortgagee. Chung Kee v. Davidson, 36 Pac. Rep. 519.

20. Partnership is not constituted by an oral agreement to locate claims as partners where no joint capital is used. Craw v. Wilson, 40 Pac. Rep. 1076.

PROTEST.

1. The allegation by a protestant that the location of a mining claim applied for was invalid because of conflict with a prior location of the protestant is simply the allegation of an adverse claimant, which may be tried only in the manner prescribed by section 2326, United States Revised Statutes, in a court of competent jurisdiction, and such an allegation by a protestant will be given no weight before the Land Department. Warren Mill Site v. Copper Prince Lode, 1 L. D. 555; Bodie Tunnel & Mining Co. v. Bechtel Cons. M. Co., 1 L. D. 584; Whitman v. Haltenhoff, 19 L. D. 245; Gowdy v. Kismet G. M. Co., 22 L. D. 624.

2. In the face of a protest, a mineral entry will be canceled where the certificate of the Surveyor General showing statutory expenditure to have been made upon the claim was not filed during the period of publication. Little Pet Lode, 4 L. D. 17, 284; Milton v. Lamb, 22 L. D. 339.

3. A protestant against a mineral entry who failed to filed an adverse claim and who does not allege non-compliance with the law on the part of the entryman is not entitled to appeal from the decision of the General Land Office dismissing his protest. Cedar Hill M. Co. v. Jacob Little Cons. M. Co., 1 L. D. 628.

4. A protest against a mineral application filed after the period of publication will not be considered by the Department on appeal unless it is shown that the protestant has an interest in the ground involved, and that the law has not been complied with by the applicant. Parsons v. Ellis, 23 L. D. 69.

5. Where a mineral entry has been allowed after due notice of application for patent, a protestant who admits the sufficiency of such notice appears solely as *amicus curiæ*, without right of appeal from a decision of the General Land Office dismissing his protest. Bright v. Elkhorn M. Co., 8 L. D. 122; Departmental decision of August 15, 1896, *In re* Johnson v. Beaufort.

6. A protestant who alleges no surface conflict of claims is not entitled to appeal from a decision of the General Land Office dismissing his protest. Smuggler M. Co. v. Trueworthy Lode, 19 L. D. 356.

7. One who simply protests against the allowance of an entry as a friend of the government is not entitled to appeal from a decision

dismissing his protest. Martin v. Baker, 6 L. D. 763; Dotson v. Arnold, 8 L. D. 439.

8. A protestant against the issuance of a mineral patent who alleges no adverse interest appears simply as *amicus curiæ*, and as such has no right of appeal from a decision dismissing his protest; but if he asserts an interest adverse to the claim of the entryman, he may appeal from such decision. Bright v. Elkhorn M. Co., 8 L. D. 122.

9. The failure of an applicant to comply with local regulations will not justify suit by the United States to vacate the patent issued to him. Such failure should be made the subject of an adverse claim or protest during the pendency of the application. Robert Hawke, 5 L. D. 131.

10. Where publication of notice of application for mineral patent was made for nine weeks only, under the Departmental practice then in force, and no rights are shown to have been injured thereby, it will not be declared insufficient on the motion of a mere protestant. Becker v. Sears, 1 L. D. 575.

11. Where a mineral entry has been allowed on satisfactory evidence of compliance with the law, the burden is upon a contestant to show non-compliance. Hargrove v. Robertson, 15 L. D. 499.

12. A notice of application for a mineral patent that fails to connect the claim with the public surveys or a United States mineral monument is insufficient, and an entry allowed on such notice may not be referred to the Board of Equitable Adjudication in the presence of a protest of persons alleging adverse claims, but republication of notice will be required. Nil Desperandum Placer, 10 L. D. 198.

13. An adverse claim may not be received until the fees therefor are paid. If offered for filing in time, but the fees are not paid until after publication, the adverse claim will be considered as a protest only. Foley v. Omaha G. M. Co., 3 C. L. O. 36.

14. When an application to enter agricultural land is made, if the locators of mining claims on the land have any objections, they must be vigilant in presenting them. The rules and regulations provide ample means for this purpose, and if the remedies are not pursued the mineral claimants will not be heard to complain. Departmental decision of March 11, 1896, *In re* Caribou Lode.

15. Where a mineral entry has been allowed upon a satisfactory showing of the mineral character of the land, a hearing will not be ordered on the protest of an agricultural claimant unless it be alleged that the land was agricultural in character at date of filing of mineral application for patent. Houghton v. McDermott, 15 L. D. 509.

16. Where, on testimony submitted at a hearing, it is finally decided that land is non-mineral in character, a hearing will not be ordered on the protest of another claimant who sets up nothing not considered in the first contest. Departmental decision of June 18, 1896, *In re* Spitzler v. Koch.

17. A protestant will not be allowed to set up possible rights of third parties as against an entryman. Bradstreet v. Rehm, 21 L. D. 30.

18. An adverse claimant is not barred from asserting his claim by the allowance of entry without legal notice of application for patent, and, where he sets up such an allegation of non-compliance with law in a protest, he has such an interest as entitles him to appeal from the action of the General Land Office dismissing his protest. Bright v. Elkhorn M. Co., 8 L. D. 122.

19. A protest alleging non-compliance with law on the part of an applicant for a mineral patent, must be sufficient to overcome record evidence of compliance with the law in order to warrant the ordering of a hearing. Whitman v. Haltenhoff, 19 L. D. 245.

20. The failure of one alleging an adverse interest to file an adverse claim does not estop him from appearing as a protestant to secure cancellation of the entry for non-compliance with law. Nevada Lode, 16 L. D. 532.

21. In the face of a mere protest the law will be construed more liberally in favor of a claimant than in the face of a contestant asserting an adverse right. 420 Mining Co. v. Bullion M. Co., 2 C. L. O. 5.

22. A protest which sets up invalidity of the location of the claim entered will not be sufficient to warrant a hearing where the validity of said location has been established in court. An allegation of fraud must be specific. T. M. Empy, 10 C. L. O. 103.

23. A protestant who alleges that the plat and the notice of the application for patent were not posted upon the claim during the

period of publication should show his means of knowing such fact. Com'r to Missoula Office, April 25, 1893, *In re* Herykaha Placer.

24. A protestant against an entry who alleges fraud on the part of the entryman should be specific as to the facts alleged to constitute the fraud. Com'r to Glenwood Springs Office, June 10, 1893, *In re* Lux Placer.

25. Questions as to entryman's title may be raised by a protestant as *amicus curiæ*. Bradstreet v. Rehm, 21 L. D. 544 (on review).

26. A claimant, under a Mexican grant, must protect his rights by filing an adverse claim and instituting suit thereon. If he fails so to do he can appear only as a protestant, and as such has no right of appeal from a decision of the General Land Office dismissing his protest. McGarrahan v. New Idria M. Co., 3 L. D. 422.

27. Proceedings may not be taken against a mineral application on a protest during the pendency of adverse suits against the application. Swaim v. Craven, 12 L. D. 294.

28. The statute does not require the names of adjoining claims to be given in the notices of application for patent, and a failure so to do will be waived, even in the face of a protest, if it appears that such failure was not fraudulent and that no injury is shown to have resulted therefrom. Louisville Lode, 1 L. D. 548. *Contra*, Gowdy v. Kismet G. M. Co., 22 L. D. 624.

29. A protestant alleging failure of the applicant to give proper notice by publication, because the published notice failed to give the names of adjoining claims, will be dismissed where such notice stated the survey numbers of such claims. Whitman v. Haltenhoff, 19 L. D. 245.

30. A protest against an application for patent should be filed in the local land office. Com'r to A. F. Johnson, August 8, 1891.

31. A hearing to determine the character of the land covered by a mineral application, and the question of compliance with the law by the applicant, may be ordered by the local land office on protest filed. Devereux v. Hunter, 11 L. D. 214.

32. Action upon a mineral entry will not be suspended to allow a protest to be filed. Com'r to Geo. W. Allen, Feb. 7, 1896.

33. The local land officers are not authorized to demand any fees for filing a protest against a mineral application or entry. Com'r to R. N. Dunn, March 17, 1893.

34. Controversies arising from private business transactions are not to be settled by the Land Department when made the subject of protest against an entry. Departmental decision of August 15, 1896, *In re* Johnson v. Beaufort.

35. In an action upon an adverse claim, where plaintiffs as evidence of their title had introduced the receiver's receipt for the entry thereof, it is admissible for the defendants to prove by decisions of the Land Department that the receipt had been canceled and set aside on the protest against the issuance of patent. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

REPAYMENT.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That in all cases where it shall, upon due proof being made, appear to the satisfaction of the Secretary of the Interior that innocent parties have paid the fees and commissions and excess payments required upon the location of claims under the act entitled "An Act to amend an act entitled 'An Act to enable honorably discharged soldiers and sailors, their widows and orphan children, to acquire homesteads on the public lands of the United States,' and amendments thereto," approved March third, eighteen hundred and seventy-three, and now incorporated in section twenty-three hundred and six of the Revised Statutes of the United States, which said claims were, after such location, found to be fraudulent and void, and the entries or locations made thereon canceled, the Secretary of the Interior is authorized to repay to such innocent parties the fees and commissions and excess payments paid by them, upon the surrender of the receipts issued therefor by the receivers of public moneys, out of any money in the Treasury not otherwise appropriated, and shall be payable out of the appropriation to refund purchase money on lands erroneously sold by the United States.

SEC. 2. In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall

have been duly canceled by the Commissioner of the General Land Office, and in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.

SEC. 3. The Secretary of the Interior is authorized to make the payments herein provided for out of any money in the Treasury not otherwise appropriated.

SEC. 4. The Commissioner of the General Land Office shall make all necessary rules, and issue all necessary instructions, to carry the provisions of this act into effect; and for the repayment of the purchase money and fees herein provided for the Secretary of the Interior shall draw his warrant on the Treasury and the same shall be paid without regard to the date of cancellation of the entries.

Act approved June 16, 1880. (21 Stat. 287.)

1. Repayment will be allowed on an entry canceled for defective publication, even though republication was ordered and claimant refused to make it. Bozeman Mineral Entry No. 21, Hayward Lode.

2. Where a mineral entry is allowed upon insufficient notice of application for patent and is therefore canceled, the price paid for the land and the $10 fee paid at date of filing the application for patent will be repaid. John R. Magruder, 1 L. D. 526.

3. The allowance of a mineral entry for a mill site under the first clause of section 2337, United States Revised Statutes, without proof of the use and occupancy of the land for mining or milling purposes, is erroneous, and upon cancellation of the entry as to the mill site the purchase money should be repaid. Hudson M. Co., 14 L. D. 544.

4. Repayment will not be made where a mineral entry has been canceled for fraud on the part of the entryman. Mary McM. Latham, 20 L. D. 379.

5. Repayment of purchase money paid in making a coal entry will not be made where the entry has been canceled for fraud. D. A. Mulvane, 15 L. D. 146.

6. Where the United States brings suit in equity to vacate a land patent for fraud in its procurement, it is not obliged to tender repayment of the purchase price paid for the land by the patentee. United States v. Trinidad Coal & Coking Co., 137 U. S. 160.

7. Money deposited to cover cost of work in the United States Surveyor General's office on a mineral survey may not be repaid, though unexpended, but may be applied on a new survey if desired. Elijah M. Dunphy, 8 L. D. 102.

8. Application for repayment after an entry has been held for cancellation is a waiver of the right of appeal. Departmental decision of Dec. 23, 1890, *In re* Unicorn Placer.

9. Where a mineral entry has been canceled, the purchase price may not be applied upon a second entry of the land by the same parties; but the purchase money must be paid upon the second entry as in the first instance. Claimants must seek relief by asking repayment of the money paid on the first entry. Com'r to Leadville Office, Sept. 12, 1896.

RESERVATION.

1. Under his authority as chief executive, the President may establish reservations embracing unappropriated mineral lands, and lands so reserved are not thereafter subject to location and purchase. Fort Maginnis Case, 1 L. D. 552. (Op. Att'y-Gen.)

2. Where a mining claim is located upon an Indian reservation, and the locator is in possession at the date the reservation is thrown open, "with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, he could, by adopting what had been done, causing a proper record to be made, and performing the amount of labor or making the improvement necessary to hold the claim, date his rights from that day; and that such location and labor and improvements would give him the right of possession." Noonan v. Caledonia M. Co., 121 U. S. 393. (Affirming 8 Dak. 189; 14 N. W. Rep. 426.)

3. A location of a mining claim upon land contained in an Indian reservation confers no rights upon the locator. If after such location the reservation is thrown open, such locator to retain the benefit of work done previously must relocate his claim. A regular location of the ground between the dates of the opening of the reservation and of relocation by the first occupant will defeat his right. Kendall v. San Juan S. M. Co., 144 U. S. 658. (Affirming 9 Colo. 349; 12 Pac. Rep. 198.)

4. A mining claim was located while the land was embraced within an Indian reserva-

tion. After the restoration of the land to the public domain another person made a regular location of the ground. *Held*, that the second locator had the superior right, for, the first location being made contrary to law, was *void ab initio* and so conferred no rights, the second location being the first one *legally* made. Kendall v. San Juan Silver M. Co., 9 Colo. 349; 12 Pac. Rep. 198; S. C., 144 U. S. 658; Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65; United States v. Carpenter, 111 U. S. 347. *Contra*, Quigley v. Gillett, 101 Cal. 462; 35 Pac. Rep. 1040.

5. No rights to a mining claim can be acquired by acts of location or appropriation done while the land located or appropriated was covered by an Indian reservation. Uhlig v. Garrison, 2 Dak. 71; 2 N. W. Rep. 253; French v. Lancaster, 2 Dak. 346; 9 N. W. Rep. 716; 47 N. W. Rep. 395.

6. But if, at the date of the opening of the reservation, one who has made a location which would have been valid but for such reservation is in possession of the claim, he may adopt his prior acts, and by indicating such adoption and making the proper record of his location he may date his rights from the opening of the reservation. Golden Terra M. Co. v. Smith (Mahler), 2 Dak. 377; 11 N. W. Rep. 97; 4 Pac. Coast Law Jour. 405; 4 Mor. Min. Rep. 390; Caledonia G. M. Co. v. Noonan, 3 Dak. 189; 14 N. W. Rep. 426. (Affirmed, 121 U. S. 393.)

7. Lands within an Indian reservation are not subject to location and purchase under the mineral land laws. Com'r to W. C. Potter, Aug. 18, 1891; Com'r to J. G. Robey, Oct. 31, 1891; Com'r to G. W. Dike, Jan. 9, 1892.

8. Section 5 of the act of July 5, 1884, provides: "Whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral land laws of the United States." 23 Stat. 104.

9. This provision is not changed by the subsequent acts relative to the disposal of abandoned military reservations, viz.: Act of Aug. 23, 1894 (28 Stat. 491); Act of Feb. 15, 1895 (28 Stat. 665).

10. Coal lands formerly embraced within a military reservation, now abandoned, are not subject to homestead entry under the act of July 5, 1884 (23 Stat. 104), but must be entered under the coal land laws. Departmental decision of May 14, 1896, *In re* Coppinger v. United States.

11. Mineral lands formerly embraced in the Uintah Indian reservation, Utah, shall be disposed of under the mineral land laws, but the purchase price shall be $20 per acre, "or at that rate for the amount taken up by the claim." Act of May 24, 1888 (25 Stat. 157).

12. A location of a mining claim in compliance with the law confers a vested right which cannot be defeated by a subsequent reservation of the land by the Executive for public uses. Fort Maginnis Case, 1 L. D. 553 (Op. Att'y Gen.).

13. A location of a mining claim in accordance with law confers a vested right of property which will except the land located from the operation of a subsequent reservation for reservoir purposes. John U. Gabathuler, 15 L. D. 418; Com'r to W. L. Shank, Dec. 28, 1891; Com'r to G. G. Newcomb, Aug. 10, 1892.

14. "If a mining claim, within a timber or forest reservation, had been duly located, and the possessory right thereto had been maintained by a strict compliance with the United States mineral land laws, prior to issuing the Executive proclamation establishing the forest reservation, the mineral claimant would have the right to enter his claim and receive patent therefor, upon showing due compliance with all requirements of the law." Com'r to Mathew T. Chestnut, Sept. 26, 1893.

15. A temporary withdrawal from entry of lands in San Juan County, Utah, with view to their permanent reservation, was not such a reservation of the land as would render mining locations made thereon illegal, said withdrawal having since been revoked. Com'r to A. L. F. McDermott, Dec. 7, 1895.

16. Mineral lands are subject to reservation as reservoir sites under the act of October 2, 1888 (25 Stat. 526), and August 30, 1890 (26 Stat. 391). John U. Gabathuler, 15 L. D. 418.

17. Land within a military reservation is not subject to location under the mineral land laws. Com'r to W. E. Smith, Aug. 22, 1891.

18. Lands within the Yellowstone National Park are not subject to mineral locations. Com'r to F. A. Pratt, April 23, 1891.

AN ACT To extend the mineral-land laws of the United States to lands embraced in the north half of the Colville Indian Reservation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the mineral-land laws of the United States be, and are hereby, extended so as to apply to all lands embraced within the Colville Indian Reservation, namely: Beginning at a point on the eastern boundary line of the Colville Indian Reservation, where the township line between townships thirty-four and thirty-five north, of range thirty-seven east, of the Willamette meridian, if extended west would intersect the same, said point being in the middle of the channel of the Columbia River, and running thence west parallel with the forty-ninth parallel of latitude to the western boundary line of said Colville Indian Reservation in the Okanogan River, thence north following the said western boundary line to the said forty-ninth parallel of latitude, thence east along the said forty-ninth parallel of latitude to the northeast corner of the said Colville Indian Reservation, thence south following the eastern boundary of said reservation to the place of beginning: *Provided*, That the land used and occupied for school purposes at what is known as Tonasket School, on Bonapart Creek, and the site of the sawmill, gristmill, and other mill property on said reservation, is hereby reserved from the operation of this Act, unless other lands are selected in lieu thereof as provided in section six of the Act which became a law, without the approval of the President, July first, eighteen hundred and ninety-two, entitled "An Act to provide for the opening of a part of the Colville Reservation in the State of Washington, and for other purposes."

Approved February 20, 1896. (29 Stat. 9.)

19. Those forest reserves in Colorado, known as the Pikes Peak, Plum Creek and South Platte Forest Reserves, "shall be open to the location of mining claims thereon for gold, silver, and cinnabar, and that title to such mining claims may be acquired in the same manner as it may be acquired to mining claims upon the other mineral lands of the United States for such purposes: *Provided*, That all locations of mining claims heretofore made in good faith within said reservations, and which have been held and worked in the same manner as mining claims are held and worked under existing law upon the public domain are validated by this act." Section 2 gives miners within said reservations the right to use timber from their claims for actual mining purposes in connection with the particular claim from which it is cut. (Act of February 20, 1896; 29 Stat. 11.)

20. Mineral deposits are to be preserved from injury in the Big Trees Reservation, California (Act of September 25, 1890; 26 Stat. 478), and in the Yosemite Forest Reservation, California. (Act of October 1, 1890; 26 Stat. 650.)

21. Land patents, in actions at law, are conclusive "of all matters of fact necessary to their issue, where the Department had jurisdiction to act upon such matters, and to determine them; but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale, or other disposition, or they had been reserved from sale, the Department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void, no matter with what seeming regularity the forms of law have been observed." Davis' Adm'r v. Weibbold, 139 U. S. 507; S. C., 7 Mont. 107.

22. "The policy of Congress as expressed in its numerous grants of public lands to aid in construction of railroads, has always been to exclude the mineral lands from them and reserve them for special disposition, as seen in the following acts among others: Acts of July 1, 1862, C. 120, 12 Stat. 489, and of July 2, 1864. C. 216, 13 Stat. 356, making grants to the Union and Central Pacific Companies; act of July 4, 1866, C. 165, 14 Stat. 83, making a grant to the Iron Mountain Railroad Company; act of July 13, 1866, C. 182. 14 Stat. 94, making a grant to the Placerville etc., Railroad; act of July 25, 1866, C. 242, 14 Stat. 239, making a grant to the California & Oregon Railroad, sections 2 and 10; act of July 27, 1866, C. 278, 14 Stat. 292, making a grant to the Atlantic & Pacific Railroad and to the Southern Pacific Railroad; act of March 2, 1867. C. 189, 14 Stat. 548, making a grant to the Stockton & Copperopolis Railroad; act of March 3, 1871, C. 122, 16 Stat. 573, making a grant to the Texas Pacific Railroad." Barden v. Northern Pacific R. R. Co., 154 U. S. 288.

23. Section 4 of the act of July 2, 1864 (13 Stat. 358), reserving certain lands from the grant to the Central Pacific Railroad Company, is erroneously printed in the Statutes at Large, the correct reading being: "And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler *on* any lands returned and denominated as min-

eral lands," etc. McLaughlin v. Menotti, 105 Cal. 572.

24. If the locator of a mining claim conveys a portion of his claim without any reservation in his deed of conveyance, his grantee would be entitled to all the ore found in the ground conveyed in any vein whose apex was within the surface lines of his deed. In other words, the rights of the grantee are measured by the terms of the deed, and in such a case section 2336, United States Revised Statutes, has no application. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98; S. C., 96 Cal. 33; 30 Pac. Rep. 889.

RES JUDICATA.

1. The doctrine of *res judicata* is not applicable in the absence of identity in the persons and parties. Merritt v. Philp, 16 L. D. 404.

2. The doctrine of *res judicata* does not apply in the face of manifest error. Southwestern M. Co. v. Gettysburg Lode, 4 L. D. 120.

3. A final decision of the Department in which a tract of land is held to be mineral in character is only conclusive up to the period covered by the inquiry, and will not preclude subsequent investigation as to the character of said tract. Dargin v. Kooh, 20 L. D. 384. See, also, Searle Placer, 11 L. D. 441; Stinchfield v. Pierce, 19 L. D. 12; Zadig v. C. P. R. R. Co., 20 L. D. 26; McCharles v. Roberts, 20 L. D. 564; Barnstetter v. C. P. R. R. Co., 21 L. D. 464; Com'r to Denver Office, August 8, 1898.

4. A decision by the Land Department as to the character of land is not conclusive as to the character as known subsequent to the trial of the case upon which the decision is rendered. Thomas v. Thomasson, 16 L. D. 52.

5. A mineral patent renders *res judicata*, so far as the Land Department is concerned, the fact that the land was known to be mineral. Blackmore v. Reilly, 17 Pac. Rep. 72.

6. Judgment by default on an adverse suit renders *res judicata* only those facts which must have been proved to support the judgment rendered. Tyler M. Co. v. Sweeney, 4 U. S. App. 329; 54 Fed. Rep. 284; S. C., Tyler M. Co. v. Last Chance M. Co., 157 U. S. 683; 7 U. S. App. 463; 61 Fed. Rep. 463.

7. The doctrine of the conclusiveness of judgments and decrees of courts, as between those who are parties to the litigation, is not applicable to the United States in regard to the proceedings before the land officers in granting patents for public lands. United States v. Miner, 114 U. S. 233.

SUIT.

(See ADVERSE, PATENT, and ABANDONMENT, pp. 297, 256, and 128.)

1. "No possessory actions between persons, in any court of the United States, for the recovery of any mining title, or for damage to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession." Sec. 910, U. S. Rev. Stat.

2. The plaintiff in a suit involving a mining claim, not under section 2326, United States Revised Statutes, need only allege ownership of the claim in general terms in his complaint. Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 183; Donahue v. Johnson, 9 Wash. St. 187.

3. Possession is sufficient to enable one to maintain an action of trespass or ejectment against a stranger, but not against one who has the right of possession. Noyes v. Black, 4 Mont. 527; 2 Pac. Rep. 769.

4. In ejectment the plaintiff must prove a legal location based on a discovery of mineral-bearing rock in place in a discovery shaft such as is required by State statute. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

5. The plaintiff in an action of ejectment between the owners of conflicting lode mining claims must prove a discovery in his discovery shaft, and that the lode there discovered extends to the ground in conflict. Van Zandt v. Argentine M. Co., 2 McCrary, 159; 4 Mor. Min. Rep. 441.

6. In ejectment for a mining claim where it appears that the discovery shafts of both parties are identical, evidence that the discoveries were made on lands patented prior to the dates of discovery of either party should be admitted, and if the fact is found, neither party can recover. Moyle v. Bullene, 44 Pac. Rep. 69 (Colo.).

7. A lode claimant claiming a conflict with another lode claim must, to recover, show that his lode extends through the conflict. Zollars & Highland Chief Cons. M. Co. v. Evans, 2 McCrary, 89; 4 Mor. Min. Rep. 407.

8. In an ejectment suit where the plaintiff shows title by patent to a mining claim, and the defendant admits possession for town site purposes, the plaintiff is entitled to a judgment without showing that the surface is necessary to the working of his mine. Abbott v. Primeaux, 16 Nev. 361.

9. In an action to recover possession of a mining claim, the plaintiff must prove some title superior to that of the defendant by a preponderance of evidence. Wills v. Blain, 4 New Mex. 378; 20 Pac. Rep. 795.

10. "If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength of his own title, and that the defendant in possession can lawfully say, until you show *some* title, you have no right to disturb me — it has not been pointed out." Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

11. The plaintiff in an action of ejectment for a mining claim may rest his right to recover upon a prior possession. Such an action does not necessarily put in issue the legal title, and plaintiff's recovery will not be conclusive of his grantor's title. Grady v. Early, 18 Cal. 108; 12 Mor. Min. Rep. 104.

12. In an action of ejectment, possession by the plaintiff is *prima facie* evidence of legal title and is sufficient as against a mere trespasser. Campbell v. Rankin, 99 U. S. 261; 12 Mor. Min. Rep. 257.

13. In an action of ejectment the legal title must prevail. The patent of the United States passes that title. Steel v. St. Louis Sm. Co., 106 U. S. 447.

14. Though in an action of ejectment to recover possession of a mining claim, if the defendant relies on forfeiture by the plaintiff, he must plead it specially, (Morenhaut v. Wilson, 52 Cal. 268), this is not the rule in adverse suits, where the better title must prevail, and if neither has it, neither will have a judgment. Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80; 1 Pac. Rep. 448; 15 Mor. Min. Rep. 292. *Contra*, Renshaw v. Switzer, 6 Mont. 464; 13 Pac. Rep. 127; 15 Mor. Min. Rep. 345.

15. Proof of the abandonment of a mining claim by a defendant may be given by plaintiff, in ejectment therefor, without a special plea, where the defendant pleads, and relies on, as a defense to the action, a location prior to that of plaintiff. Trevaskis v. Peard, 44 Pac. Rep. 246 (Cal.).

16. The validity of a mining location may not be questioned in an ejectment suit where both parties claim under such location. Union Cons. M. Co. v. Taylor, 100 U. S. 37; 5 Mor. Min. Rep. 323.

17. The defendant in an ejectment suit involving a mining claim may prove the plaintiff's title to have been lost by abandonment of the claim, under a general denial of plaintiff's title. Bell v. Brown, 22 Cal. 671; 15 Mor. Min Rep. 240.

18. An adverse suit should be brought in proper form. If the plaintiff is in possession he should bring his suit to quiet title; if not in possession, he should bring his action in ejectment. Wolverton v. Nichols, 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309. See S. C., 119 U. S. 485.

19. In Colorado an adverse suit should be brought as an action of ejectment. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304. (Second trial, 17 Colo. 243; 29 Pac. Rep. 173.)

20. In an adverse suit in the nature of an action of ejectment, ouster need not be proven by plaintiff. Wolverton v. Nichols, 119 U. S. 485; 2 Pac. Rep. 308; 15 Mor. Min. Rep. 309.

21. The Attorney General of the United States has authority to bring suit on behalf of the United States to vacate a land patent. United States v. San Jacinto Tin M. Co., 125 U. S. 273. (Affirming S. C., 23 Fed. Rep. 279.) United States v. Beebe, 127 U. S 338.

22. Where a patent erroneously issues for land which the United States is required by law to convey to one other than the patentee, the United States will bring suit to vacate. Hughes v. United States, 4 Wall. 232.

23. "If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course." Moore v. Robbins, 96 U. S. 530.

24. In the case of a known lode in a placer claim at date of the placer application for patent, and not included in the placer application, the rule which applies to all actions to recover possession of real estate applies, namely, that the plaintiff can only recover on the strength of his own title and not on the weakness of defendant's title. Reynolds v. Iron Silver M. Co., 116 U. S. 687; 15 Mor. Min. Rep. 591.

25. The exemption of the government from the operation of the Statute of Limitations or from the application of the doctrine of stale claim will not allow the statute or said doctrine to be evaded by the bringing of suit in the name of the United States, when a private person is the real party in interest. United States v. Beebe, 127 U. S. 338.

26. When an original purchaser of mining lands has complied with the legal requirements and obtained a patent certificate from the government, he has acquired a vested right in the land—a legal estate that can be recovered in an action of ejectment. Such an action is not subject to the Statute of Limitations of Oregon, which is intended to apply to lands still subject to governmental disposition. Rader v. Allen, 27 Oreg. 344; 41 Pac. Rep. 154.

27. An applicant for a placer patent who has given due notice thereof and made entry may maintain a suit to quiet title against one claiming under a conflicting lode location. Dahl v. Raunheim, 132 U. S. 260.

28. Where the United States brings a suit in equity to vacate a land patent for fraud in its procurement, it is not obliged to tender repayment of the purchase price paid for the land by the patentee. United States v. Trinidad Coal & Coking Co., 137 U. S. 160.

29. Where a patent has been obtained through fraud, and if allowed to stand would work prejudice to the rights of the United States, or prevent it from fulfilling an obligation, suit to vacate is warranted. United States v. Missouri, K. & T. R. Co., 141 U. S. 358.

30. Where mining property has been developed by the courage and energy and at the expense of defendants until it has become of enormous value, courts will look with disfavor upon the claims of a party thereto who has lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of such party's rights. Johnson v. Standard M. Co., 148 U. S. 360.

31. The United States will bring suit to vacate a patent issued through fraud or mistake. United States v. Wilson, 30 Fed. Rep. 309.

32. A hearing to determine whether or not suit should be recommended to vacate a United States patent should be ordered only by the Secretary of the Interior. Butte & Boston M. Co., 21 L. D. 125.

33. Clear and convincing proof must be presented to warrant the Land Department in recommending suit to vacate a patent for fraud. Butte & Boston M. Co., 21 L. D. 125.

34. Suit to vacate should be recommended if patent was issued upon an incorrect survey. United States v. Rumsey, 22 L. D. 101.

35. Questions of the rights between town site and mineral claimants must be determined by the courts. Rico Town Site, 1 L. D. 556.

36. The courts are to decide all questions as to relative rights of contesting claimants. Eldred v. Lasey, Sickel's Min. Dec. 284.

37. In an action to quiet title to a mining claim where plaintiff sought to prove the performance of annual labor before defendant's relocation, a finding of the jury under defendant's testimony that the value of such work was less than $100 will not be disturbed on appeal, where plaintiff barely proved the performance of the required work, if at all, under the best view of his testimony. Hirschler v. McKendricks, 16 Mont. 211; 40 Pac. Rep. 290.

TAXATION.

1. The possessory title to a mining claim is such property as is subject to taxation by the State. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183; State v. Moore, 12 Cal. 56; 14 Mor. Min. Rep. 110; Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240; Hale & Norcross G. & S. M. Co. v. Story County, 1 Nev. 104; 14 Mor. Min. Rep. 115.

2. After entry, land may be taxed by the State. Alta M. & Sm. Co. v. Benson M. & Sm. Co., 16 Pac. Rep. 565.

3. The moment mineral or ore becomes detached from the soil of the public lands in which it is imbedded, it becomes personal

property, the ownership in which is in the man whose labor, capital and skill has discovered and developed the mine and extracted the ore. It is then free from any lien, claim or title of the United States, and is rightfully subject to taxation by the State as any other personal property is. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183.

4. The Nevada statutes, which make a tax upon ore taken from mining claims a lien on the mine or mining claims from which the ore is extracted, are not an interference with the right of property of the government in the lands from which the ore is extracted. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183.

5. Payment of taxes by the adverse possessor is essential to the obtaining of title by adverse possession. Tuffree v. Polhemus, 108 Cal. 670.

TIMBER.

Timber and Stone Entries.

An Act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That surveyed public lands of the United States within the States of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale, according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre: and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided*, That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: *And provided further*, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonged to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

Sec. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase-money of said land, together with the fees of the register and the receiver,

as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

* * * * * * * *

SEC. 6. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Approved June 3, 1878. (20 Stat. 89.)

The provisions of the above act were extended to all public land States and Territories by the act approved August 4, 1892 (27 Stat. 348). For copy of the act and regulations thereunder, see MINERALS, subtitle *Stone*, p. 80.

AN ACT to amend section eight of an act approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, be and the same is hereby amended so as to read as follows:

SEC. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain: *Provided*, That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for cutting of timber on mineral lands.

Approved March 3, 1891. (26 Stat. 1093.)

AN ACT authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States and other persons, bona fide residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land-office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact: and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

Approved June 3, 1878. (20 Stat. 88.)

1. The object of the act of June 3, 1878 (20 Stat. 88), was to enable inhabitants of the States and Territories mentioned to cut tim-

ber on mineral lands. If mineral districts are found outside those named, they are also within the operation of the law. A miner may cut timber from his claim for use in his mine. Instructions of Aug. 7, 1882, 1 L. D. 600; Com'r to Susanville Office, 1 L. D. 616.

2. Section 4 of the act of June 3, 1878, authorizes residents of California, Nevada, Oregon and Washington to go upon non-mineral lands and take therefrom timber for use on their farms and in their mines. Timber may not be so cut, however, for purpose of sale. Com'r to J. L. Mills, 1 L. D. 602; Com'r to Susanville Office, 1 L. D. 616; Com'r to P. D. Hurlbut, 1 L. D. 618.

3. Mineral lands and those containing mining improvements are not subject to sale under the act of June 3, 1878. Circular of May 21, 1887, 6 L. D. 114; Circular under Act of March 3, 1891, 12 L. D. 456.

4. A mining claimant holding under possessory title has a license to work his claim for minerals, and has a right to cut timber thereon as rendered necessary for mining purposes, but not for sale. United States v. Nelson, 5 Sawy. 68; 14 Mor. Min. Rep. 381.

5. The owner of a valid location is entitled to its exclusive use and possession, and a stranger who enters thereon for the purpose of mining, cutting timber, or otherwise interfering with the owner's use or possession, is a trespasser. Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240. See, also, Gwillim v. Donellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

6. A mine owner, holding under possessory right in compliance with law, may maintain an action of trespass against one who removes timber from the claim. McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076.

7. Timber may be cut on land returned by the United States Surveyor General as mineral, under the act of June 3, 1878. United States v. Edwards, 38 Fed. Rep. 812.

8. Locators of mining claims have the exclusive right of possession to the surface ground embraced in their claims, and to the timber growing thereon. E. T. George, 2 C. L. O. 114.

9. The timber on a tunnel site belongs to the tunnel owner. Tunnel Rights, 5 C. L. O. 24.

10. Under the act of June 3, 1878 (20 Stat. 88), timber on the public mineral lands may be cut for sale in the State in which it is cut. Frank P. Hardin, 1 L. D. 597.

11. Coal lands are not "mineral lands," within the meaning of the act of June 3, 1878, authorizing the cutting of timber on mineral lands in certain States. Instructions, 2 L. D. 827.

12. If the land contains gold or other valuable deposits in loose earth, sand or gravel, which can be secured at a profit, it is enterable under the placer mining laws, regardless of other valuable qualities it may possess, such as timber, or the uses besides mining to which it may be put. United States v. Iron Silver M. Co., 128 U. S. 673. (Affirming S. C., 24 Fed. Rep. 568.)

13. If a patent is secured under the placer mining laws for land not containing any placer deposits for the purpose of securing title to the timber thereon, the United States may maintain a suit to vacate such patent for fraud in its procurement. United States v. Iron Silver M. Co., 128 U. S. 673. (Affirming S. C., 24 Fed. Rep. 568.)

14. The use of wood in quartz mills or reduction works is a use for mining purposes within the meaning of the act of June 3, 1878 (20 Stat. 88), allowing timber cutting. Frank P. Hardin, 1 L. D. 597.

15. If a mill site legally held is timbered, the locator may cut the timber for the purpose of constructing a mill, reduction works, tramways or other accessory required in the development of his mineral interest, but not for sale or for the use of other persons. A. B. Page, 1 L. D. 614.

16. The use, in a mine, of timber growing upon land is not such a use of the land as will warrant entry thereof as a mill site appurtenant to the mine under the first clause of section 2337, United States Revised Statutes. Twin Sisters Lode and Mill Site, 7 L. D. 557.

17. Entry under the timber land laws is not allowed if the land contains mining improvements made and maintained by another in good faith. Kneeland v. Norton, 10 L. D. 271.

18. On a contest between a mineral claimant and one claiming under the act of June 3, 1878, if the land is shown to be mineral in character it will be awarded to the mineral claimant. Departmental decision of Feb. 17, 1892, *In re* Gissendoffer v. Towle.

19. Milling parties cannot sell timber cut from mineral lands to lumber dealers. Such timber must be sold to individuals for personal use. Arthur Grabowskie, 14 C. L. O. 252.

TOWN SITE.

1. "Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States." Sec. 2386, U. S. Rev. Stat.

2. "No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper, or to any valid mining-claim or possession held under existing laws." Sec. 2392, U. S. Rev. Stat.

3. "Thus read they must be held, we think, merely to prohibit the passage of title under the provisions of the Town-Site Laws, to mines of gold, silver, cinnabar or copper, which are known to exist, on the issue of the town site patent, and to mining claims and mining possessions, in respect to which such proceedings have been taken under the law or the customs of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The exceptions of mineral lands from pre-emption and settlement and from grants to States for universities and schools, for the construction of public buildings and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining States which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral,' in the sense of this Statute is applicable." Davis' Adm'r v. Weibbold, 139 U. S. 507. (Citing and approving Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; 16 Fed. Rep. 848; United States v. Reed, 12 Sawy. 99; 28 Fed. Rep. 486; Cowell v. Lammers, 10 Sawy. 246; Alford v. Barnum, 45 Cal. 482; 10 Mor. Min. Rep. 422; Merrill v. Dixon, 15 Nev. 401; Dughi v. Harkins, 2 L. D. 721; Cleghorn v. Bird, 4 L. D. 478; Samuel W. Spong, 5 L. D. 193; Com'rs of Kings County v. Alexander, 5 L. D. 126; Magalia G. M. Co. v. Ferguson, 6 L. D. 218; Nicholas Abercrombie, 6 L. D. 398; John Downs, 7 L. D. 71; Cutting v. Reininghaus, 7 L. D. 265; Creswell M. Co. v. Johnson, 8 L. D. 440; Thomas J. Laney, 9 L. D. 83.)

4. "It is established by former decisions of this court, that under the acts of Congress which govern this case, in order to except mines or mineral lands from the operations of a town site patent, it is not sufficient that the lands do, in fact, contain minerals, or even valuable minerals, when the town site patent takes effect; but they must, at that time, be known to contain minerals, of such extent and value as to justify expenditures for the purpose of extracting them; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable or are afterwards discovered to be still valuable for such purposes, does not defeat or impair the title of persons claiming under the town site patent." Dower v. Richards, 151 U. S. 658.

5. Placer lands are not subject to town site entry. Town Site of Deadwood, 8 C. L. O. 155.

6. A patent for a town site is inoperative as to all lands known at the time (of entry) to be valuable for their minerals, or discovered to be such before their occupation or improvement. Deffeback v. Hawke, 115 U. S. 392; Richards v. Dower, 151 U. S. 658; 81 Cal. 44; 22 Pac. Rep. 304; Pierce v. Sparks, 115 U. S. 408; 23 N. W. Rep. 491; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858; King v. Thomas, 12 Pac. Rep. 865; W. A. Simmons, 7 L. D. 283.

7. To be excepted from a town site patent, land must have been known to be mineral at date of town site patent (entry), and the fact that it is thereafter discovered to be valuable for mineral prior to its use or occupancy for town site purposes is immaterial. McCormick v. Sutton, 97 Cal. 373.

8. No title can be obtained under the pre-emption, homestead or town site laws to land known at the time of sale to be valuable for its minerals, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas. Deffeback v. Hawke, 115 U. S. 392; Sparks v. Pierce, 115 U. S. 408.

9. To be reserved from entry under the town site laws, land must, at date of such entry, (1) be covered by a valid mining claim, or (2) be known to be valuable for mineral. Duffy Quartz Mine, 18 L. D. 259.

10. A lode, to be excepted from a town site patent, need not have been located at the date of town site entry. It is excepted if known. Dower v. Richards, 73 Cal. 477; 15 Pac. Rep. 105.

11. Mere occupation of public land as a town lot will not prevent mining of the land. Martin v. Browner, 11 Colo. 12; 1 Mor. Min. Rep. 613.

12. A prior mining location is not affected by town site occupation. Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

13. Mere occupation of land for residence or business purposes by those who have taken no steps to acquire government title will not reserve land from mineral entry. O'Keefe v. Cannon, 52 Fed. Rep. 898.

14. The occupation of land for town site purposes cannot withdraw it from location and entry under the mineral land laws, if it is valuable for minerals contained. Deffeback v. Hawke, 115 U. S. 392; Sparks v. Pierce, 115 U. S. 408; Poire v. Wells, 6 Colo. 406; J. D. Rankin, 7 L. D. 411; Dotson v. Arnold, 8 L. D. 439; Ferrell v. Hoge, 18 L. D. 81; Deadwood Town Site, 8 C. L. O. 18.

15. Land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes; its exemption is only from settlement and sale under the pre-emption laws. Steel v. St. Louis Sm. Co., 106 U. S. 447; J. D. Rankin, 7 L. D. 411.

16. The present or prospective value of mineral lands for town site purposes will not prevent acquisition of title thereto under the mineral land laws. State of Washington v. McBride, 18 L. D. 199; Kemp v. Starr, 6 C. L. O. 8.

17. Land covered by a town site patent may not be entered under the mineral land laws because discovered after the town site entry to be valuable for mineral. Thomas J. Laney, 9 L. D. 83; G. R. Williams, 9 C. L. O. 147.

18. After patent has issued for a town site, a miner may not locate a claim inside the patented limits, and then attack the validity of the town site patent on the ground that the land located was known to be mineral at date of town site entry. The patent must be attacked directly, if at all. Carter v. Thompson, 65 Fed. Rep. 329.

19. A claim was worked until 1869 and then abandoned. Town site patent issued in 1869. A claim was located covering the same ground in 1884. *Held*, that this was not a mine such as would be excepted from the town site patent. Richards v. Dower, 81 Cal. 44; 22 Pac. Rep. 304; 151 U. S. 658.

20. Land not known to be mineral at date of town site entry passes by the town site patent. Tombstone Town Site Case, 15 Pac. Rep. 26.

21. Mines within the limits of incorporated towns discussed. Steel v. St. Louis Sm. Co., 106 U. S. 447.

22. A claimant under a town site patent which contained the usual exception of mining claims acquired no interest in a valid mining claim or in the surface thereof. The mineral claimant need not adverse the town site application. Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574: Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858; Esler v. Town Site of Cooke, 4 L. D. 212.

23. Coal lands cannot be included in a town site entry. Town Site of Coalville, 4 C. L. O. 46.

24. The question of the relative legal rights of town site and mineral claimants to possessory title to surface ground must be left to the courts. Rico Town Site, 1 L. D. 556.

25. A town site entry may embrace mineral land, the rights of miners being protected by section 2386, United States Revised Statutes. Rico Town Site, 1 L. D. 556.

26. Town sites may be located on mineral lands, the rights of mining claimants being protected by statutory reservations thereof inserted in a town site patent. (Secs. 2386 and 2392, U. S. Rev. Stat.) Relative rights of

mining claimants and of town site claimants are to be decided by the courts. Esler v. Town Site of Cooke, 4 L. D. 212.

AN ACT to repeal timber-culture laws, and for other purposes.

(Approved March 3, 1891. 26 Stat. 1101.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. * * *

SEC. 16. That town site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.

27. As to town sites under section 16, act of March 3, 1891, see Com'r to Del Norte Office, Dec. 28, 1893.

28. Previous to 1891, mineral lands could not be acquired under town site laws. Hawke v. Deffeback, 22 N. W. Rep. 480. (See 115 U. S. 392.) Pierce v. Sparks, 22 N. W. Rep. 491. (See 115 U. S. 408.)

29. Section 16, act of March 3, 1891 (26 Stat. 1095), relative to the allowance of town site entries of mineral lands, is not retroactive. Protector Lode, 12 L. D. 662; Pacific Slope Lode, 12 L. D. 686.

30. When application for patent is made for a lode claim embraced within a patented town site, the town site claimants should protect any rights they may have by filing an adverse claim and securing a judicial determination thereof. If they fail so to do, the United States will not bring suit to vacate the lode patent. Thomas Starr, 2 L. D. 759; Smoke House Lode, Butte City, 4 L. D. 555.

31. A town lot owner must adverse a mineral application for patent. Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

32. Patents may be issued for a town site and for a mining claim covering the same land, with a reservation in each of the rights of the other claimant. Rico Town Site, 1 L. D. 556; M. A. Hickey, 3 L. D. 88. *Contra*, Deffeback v. Hawke, 115 U. S. 392; Butte City Smoke House Lode Cases, 6 Mont. 397; 12 Pac. Rep. 858; W. A. Simmons, 7 L. D. 283; Antediluvian Lode and Mill Site, 8 L. D. 602.

33. Instructions as to reservation in patents under the decision in Deffeback v. Hawke, 115 U. S. 392; 5 L. D. 256.

34. Where a mineral patent has been issued containing a clause reserving the rights of a town site claimant (unwarranted by law), and the patentee refuses for that reason to accept the patent, it may be canceled and a hearing ordered to determine the rights of the parties. Harry Livingston Lode, 7 L. D. 319.

35. In an ejectment suit, where plaintiff shows title by patent for a mining claim, and defendant admits possession for town site purposes, plaintiff is entitled to judgment without showing that the surface is necessary to the working of his mine. Abbott v. Primeaux, 16 Nev. 361.

36. The owner of a town lot under a patent issued prior to 1872 has absolute fee-simple title to all of the lot in which known mines did not exist. A mine owner has no right to tunnel or work on portions of the lot where a mine does not exist. Dower v. Richards, 73 Cal. 477; 15 Pac. Rep. 105.

37. Where, prior to application for patent, the owner of a mining claim conveys a part thereof as a town lot, the grantee is not bound to adverse the application, but the patentee takes title subject to a trust in favor of his grantee. Suessenbach v. First National Bank, 5 Dak. 477; 41 N. W. Rep. 662.

38. A lode is located, but the location certificate is defective for uncertainty. A town site entry is then made. Then the location is amended. Two patents issued. *Held*, that the location, being invalid, might not be amended after the intervention of adverse town site rights. Tombstone Town Site Case, 15 Pac. Rep. 26.

39. The Land Department cannot include in a town site patent any mine, mining claim or possession. If such is included in the patent, the same to that extent is void. Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434; Silver

Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574.

40. The fact that land on which the discovery and location of a mining claim are made is within the patented limits of a town will not affect the title of the locator where it was known prior to the issuance of town site patent that a mineral vein existed where the discovery and location were made. Moyle v. Bullene, 44 Pac. Rep. 69 (Colo.).

41. Upon a sufficient showing to the effect that a lode applied for within a patented town site was known to be valuable for its minerals at date of the town site entry, the Department may order an investigation with a view to the recommendation of suit to vacate the town site patent to such lode. Thomas J. Laney, 9 L. D. 83; Plymouth Lode, 12 L. D. 513; Pacific Slope Lode, 12 L. D. 686; Protector Lode, 12 L. D. 662; Cameron Lode, 13 L. D. 369.

42. A patent issued for a town site conveys no title to a known mining claim situate within the town site, but such patent, while outstanding, removes the land and the title thereto from the jurisdiction of the Department and precludes the issuance of a patent for said claim. Pacific Slope Lode, 12 L. D. 686. *Contra*, South Star Case, 20 L. D. 204.

43. Where the applicant for a patent for a lode claim situate within a patented town site shows such lode to have been known at the date of the town site entry, he may procure a reconveyance of the conflict by the town site to the United States, and thus reinvest the Land Department with jurisdiction to patent the claim. Pederson Lode v. Black Hawk Town Site, 14 L. D. 186; Com'r to Denver Office, July 10, 1896, *In re* Dump Lode.

44. If a mine was known at date of town site entry covering the same, it was excepted from the patent issued on the town site entry and may be patented to the mineral claimant. Com'r to Denver Office, Nov. 16, 1895, Antediluvian Lode. (Applying South Star Case, 20 L. D. 204.)

45. Where a mining claim is located upon land afterwards entered as a town site, the prior issuance of the town site patent does not affect the mining location, since the mining patent, when issued, takes effect from the date of the location of the claim by relation. Chambers v. Jones, 17 Mont. 156.

46. A town site entry may be allowed to embrace non-contiguous tracts where the original town site application was for contiguous lands and the subsequent non-contiguity is caused by the exclusion of land decided, on hearing had, to be mineral in character and covered by a mining claim. McChrystal v. Eureka Town Site, 21 L. D. 478.

47. A person who makes improvements upon public land, knowing that he has no title, and that the land is open to exploration and sale for its minerals, and makes no effort to secure the title to it as such, under the laws of Congress, or a right of possession under the local customs and rules of miners, has no claim to compensation for his improvements as an adverse holder in good faith, when such sale is made to another and the title is passed to him by a patent of the United States. Sparks v. Pierce, 115 U. S. 408.

48. A mill site location does not reserve the land covered thereby from town site entry. Rico Town Site, 1 L. D. 556.

49. A mill site is a mining claim or possession under section 2392, United States Revised Statutes, and is excepted from town site patent if located prior to town site entry. Hartman v. Smith, 7 Mont. 19; 14 Pac. Rep. 648.

50. Proof of the sale of a mining claim two years after the issuance of town site patent is not evidence of the known mineral value at date of said patent. Richards v. Dower, 81 Cal. 44; 22 Pac. Rep. 804. See S. C., 151 U. S. 658.

TRESPASS.

(See ADVERSE and SUIT, pp. 284 and 445.)

1. In actions of ejectment or trespass, possession by plaintiff has always been held *prima facie* evidence of the legal title, and, as against a mere trespasser, it is sufficient. Campbell v. Rankin, 99 U. S. 261; 12 Mor. Min. Rep. 257. (Citing 2 Greenl. Ev., sec. 311; Atwood v. Fricot, 17 Cal. 37; 2 Mor. Min. Rep. 805; English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202; Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217.)

2. Mere possession of mineral land is good as against a mere intruder, but not against one who has complied with the law and made a legal location. Atwood v. Fricot, 17 Cal.

87; 2 Mor. Min. Rep. 305; English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202; Hess v. Winder, 30 Cal. 349; 12 Mor. Min. Rep. 217; Du Prat v. James, 65 Cal. 556; 4 Pac. Rep. 562; Garthe v. Hart, 73 Cal. 541; 15 Pac. Rep. 93; 15 Mor. Min. Rep. 492; Neuebaumer v. Woodman, 89 Cal. 310; 26 Pac. Rep. 900; Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

3. Mere possession of mineral land is sufficient upon which to recover in trespass or ejectment against one having no title, but not as against one having the right of possession. Noyes v. Black, 4 Mont. 527; 2 Pac. Rep. 769.

4. A *possessio pedis* of mining land is good as against a mere trespasser, but, in absence thereof, claimant must show a legal location to succeed in a suit against a trespasser. Funk v. Sterrett, 59 Cal. 613.

5. To support an action of trespass, personal possession, *possessio pedis*, on the ground, is not necessary. McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076; Neuebaumer v. Woodman, 89 Cal. 310; 26 Pac. Rep. 900.

6. In an action of trespass on a mining claim the plaintiff need show only that he has possession, unless the defendant shows some sort of title superior to that of mere possession. Patchen v. Keeley, 19 Nev. 404; 14 Pac. Rep. 847; Courchainer v. Bullion M. Co., 4 Nev. 369.

7. An alien in actual possession of public land will be protected against a naked trespasser not claiming under government title. Courtney v. Turner, 12 Nev. 345.

8. In the description of the boundaries in a conveyance, monuments designated as the corners of the tract conveyed will prevail over designated measurements, and parol evidence is admissible for the purpose of pointing out these monuments and showing the identity of the land conveyed with that upon which trespass was committed. Stinchfield v. Gillis, 107 Cal. 84; 40 Pac. Rep. 98; S. C., 96 Cal. 33; 30 Pac. Rep. 839.

9. A complaint in a mere action of trespass need only allege in general terms ownership of the mining property. Allegations of location, etc., are not required. McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076; Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 188.

10. In a suit for trespass upon a mining location the plaintiff must show citizenship, and if the defendant justifies under another location he must show his citizenship, as no rights could be acquired by location without it. Bohanon v. Howe, 2 Idaho, 417; 17 Pac. Rep. 583. *Contra*, Jackson v. Dines, 13 Colo. 90; 21 Pac. Rep. 918; McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1070. (In the last case the Supreme Court of Colorado *expressly* refuses to follow the rule laid down by the Supreme Court of Idaho, in Bohanon v. Howe.)

11. A tortious entry is unavailing for the purpose of making a valid location of a mining claim. Belk v. Meagher, 104 U. S. 279; 1 Mor. Min. Rep. 510; S. C., 3 Mont. 65.

12. A location of a mining claim made by one whose entry upon the claim was a trespass is illegal and confers no rights. Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Sawy. 355; 34 Fed. Rep. 515; 15 Mor. Min. Rep. 581.

13. Entering upon premises in the actual possession of another, for the purpose of performing the acts necessary to constitute location and possession, amounts only to trespass, and cannot form the basis for the acquisition of title. Lebanon Mining Co. v. Cons. Republican Mtn. M. Co., 6 Colo. 381; Omar v. Soper, 11 Colo. 380; 18 Pac. Rep. 443; 15 Mor. Min. Rep. 496.

14. "When one has discovered a vein and has complied fully with the law in locating a claim thereon, the territory inclosed within his surface boundaries is segregated from the public domain in so far as all parties except the government, are concerned. * * * The prospector cannot go within such surface boundaries to prospect for mineral veins, and his act, if he do so, is as much trespass as though the land was patented." Armstrong v. Lower, 6 Colo. 398; 15 Mor. Min. Rep. 631. (Affirmed, 6 Colo. 581; 15 Mor. Min. Rep. 458.) See Branagan v. Dulaney, 2 L. D. 744.

15. The marking of a claim by a trespasser may be adopted by the discoverer. Miller v. Taylor, 6 Colo. 41; 9 Mor. Min. Rep. 547.

16. Improvements made by a trespasser upon a mining claim may not be purchased by a claimant after suit brought to determine the right of possession, and considered as having been made, originally, by claimant. Little Gunnell M. Co. v. Kimber, 1 Mor. Min. Rep. 536.

17. If plaintiffs performed the acts required by law to locate a quartz claim except the labor, the year not having expired, and the defendants undertook to take possession of the ground, they were trespassers. Atkins v. Hendree, 1 Idaho, 95; 2 Mor. Min. Rep. 328.

18. Annual labor may be performed at any time during the year, and a relocator for abandonment before the expiration of the year is a mere trespasser. Atkins v. Hendree, 1 Idaho, 95; 2 Mor. Min. Rep. 328.

19. Where two conflicting claims are located, neither based on a valid discovery of mineral, the superior right is with him who first makes a discovery, but the first locator, before a discovery by either, may prevent entry upon the land in his possession. Crossman v. Pendery, 2 McCrary, 139; 8 Fed. Rep. 693; 1 Colo. Law Rep. 496; 4 Mor. Min. Rep. 431.

20. As between two conflicting locations, both defective, the prior locator has the superior right of possession, and may enforce it in an action of trespass against the other. Neuebaumer v. Woodman, 89 Cal. 310; 26 Pac. Rep. 900.

21. "If after one has discovered a lode, and set up a notice of his claim to it, and within the time fixed by law, for doing the work necessary to a valid location, another, coming to the same place and taking possession thereof to the exclusion of the first, shall not have advantage of his own wrong; nor shall the subsequent locator be permitted to allege anything against the right of the first locator." Erhardt v. Boaro, 3 McCrary, 19. See 2 McCrary, 141; 8 Fed. Rep. 692; 2 Colo. Law Rep. 89; 1 Mor. Min. Rep. 452. (Affirmed, 113 U. S. 527; 4 Mor. Min. Rep. 432.)

22. The forcible ouster by a trespasser of one who has discovered a mineral-bearing lode, and has posted a notice of his claim thereon, during the time allowed the discoverer by law to perfect his location, and the prevention of the discoverer from compliance with the law in that regard, excuse him, at least as against such intruder, from a performance of the various acts necessary to a legal location. Erhardt v. Boaro, 113 U. S. 527; 4 Mor. Min. Rep. 432.

23. One who, by force and intimidation, has prevented the discoverer of a lode from perfecting his location, will not be heard to set up the discoverer's failure so to do, as that would be to allow him to profit by his own wrong. Miller v. Taylor, 6 Colo. 41; 9 Mor. Min. Rep. 547.

24. The fact that no work is done on a mining claim during the year, will not operate as an abandonment where the claim is adversely held by a trespasser. Mills v. Fletcher, 100 Cal. 143; 34 Pac. Rep. 637.

25. Locators of mining claims, so long as they comply with the law, have "the exclusive right of possession and enjoyment of all the surface included within the lines of their location." This is a right of property, and the claimant must protect himself from trespassers by proceedings in court. Lewis Smith, 1 L. D. 615.

26. The holder of a mining claim upon which trespasses are committed should protect himself by an action before the local courts, as the Land Department is powerless to give relief. Com'r to H. Clendenen, June 24, 1891.

27. A mine owner holding under possessory right in compliance with law may maintain an action of trespass against one who removes timber from the claim. McFetters v. Pierson, 15 Colo. 201; 24 Pac. Rep. 1076.

28. The owner of a valid location is entitled to its exclusive use and possession, and a stranger who enters thereon for the purpose of mining, cutting timber or otherwise interfering with the owner's use or possession is a trespasser. Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240. See, also, Gwillim v. Donnellan, 115 U. S. 45; 15 Mor. Min. Rep. 482.

29. A coal declarant in possession may sue for the value of stone removed from the land by one without title. Johnston v. Harrington, 5 Wash. St. 78; 31 Pac. Rep. 316.

30. Damages for trespass are measured by the value of gold taken, less the expense of digging the gold-bearing earth and separating it from the realty so as to make it personal property. Maye v. Yappen, 23 Cal. 306; Goller v. Fett, 30 Cal. 481; 11 Mor. Min. Rep. 171.

31. The cost of production of ore wrongfully taken from a mining claim may be set off by the defendant from the value of ore taken from the plaintiff's claim. Hawkins v. Spokane Hydraulic M. Co., 28 Pac. Rep. 433; 33 Pac. Rep. 40.

32. The owner of a mining claim who sues in trespass, if he wishes damages further than

to the value of the ore taken, should set forth the special damages in his complaint. Patchen v. Keeley, 19 Nev. 404; 14 Pac. Rep. 847.

33. In an action of trespass to recover damages, the plaintiff may recover although the trespass was not wilful. Maye v. Yappen, 23 Cal. 306.

34. A locator working subterraneously into the dip of a vein belonging to another locator, who is in possession of his location, is a trespasser and liable in an action of trespass for ore taken therefrom. Flagstaff S. M. Co. v. Tarbett, 98 U. S. 463; 9 Mor. Min. Rep. 607.

35. Injunction is a proper remedy for the illegal interference with the working of a mining claim. Fuller v. Swan River Placer M. Co., 19 Pac. Rep. 836.

36. Entry on land held by another under assertion of title is an ouster, otherwise a mere trespass. West v. Lanier, 9 Humph. 762; 12 Mor. Min. Rep. 184.

37. A United States patent is not to be collaterally attacked. It is not to be impeached by trespassers. Cowell v. Lammers, 10 Sawy. 246; 21 Fed. Rep. 200; 8 West Coast Rep. 504.

38. A miner has no right to dig or work within the inclosure surrounding a dwelling-house, corral and other improvements of another. Burdge v. Underwood, 6 Cal. 45 (1856).

TRUST—TRUSTEE.

(See ENTRY and PATENT, pp. 239 and 277.)

I. REGULATIONS.
II. DECISIONS.

I. REGULATIONS.

93. A party who is not an applicant for patent under section 2325, Revised Statutes, or the assignee of such applicant, is not entitled to make entry under said section, and in no case will the name of such party be inserted in the certificate of entry. This regulation has no reference to proceedings under section 2326.

94. Any party applying to make entry as *trustee* must disclose fully the nature of the trust and the name of the *cestui que trust;* and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

II. DECISIONS.

1. After a legal entry and payment for public lands the United States holds only the naked legal title in trust for the entryman, the patent when issued relating back to the date of entry. Carroll v. Safford, 3 Wall. 441; Witherspoon v. Duncan, 4 Wall. 210; Hughes v. United States, 4 Wall. 232; Wirth v. Branson, 98 U. S. 118; Union M. & M. Co. v. Danberg, 2 Sawy. 450; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 645; Hamilton v. Southern Nevada G. & S. M. Co., 13 Sawy. 113; 33 Fed. Rep. 562; 15 Mor. Min. Rep. 314; People v. Shearer, 30 Cal. 648; Astrom v. Hammond, 3 McLean, 107; Carroll v. Perry, 4 McLean, 26; United States v. Freyberg, 32 Fed. Rep. 195; Jones v. United States, 35 Fed. Rep. 561; Montgomery v. United States, 36 Fed. Rep. 4; Alta M. & Sm. Co. v. Benson M. & Sm. Co., 16 Pac. Rep. 565; Goodlett v. Smithson, 5 Port. (Ala.) 246; 3 Am. Dec. 561; Gwynne v. Niswanger, 15 Ohio, 368; Ross v. Supervisors, 12 Wis. 38.

2. An entry of lands is equivalent to the issuance of patent therefor as between the entryman and third persons, the government thereafter holding only the naked legal title in trust for the entryman. The patent when issued relates back to the inception of the right of the patentee. Deffeback v. Hawke, 115 U. S. 392.

3. A legal entry of public land vests the equitable title thereto in the entryman, the United States thereafter holding the legal title in trust for the entryman until a patent issues; and this right cannot be defeated by an order of the Land Department, issued without warrant of law, canceling the entry. Cornelius v. Kessel, 128 U. S. 456.

4. A patent issued to a citizen as trustee for an alien may not be attacked collaterally by a third person. Justice M. Co. v. Lee, 40 Pac. Rep. 444.

5. A mineral entry made by a citizen as a trustee for an alien corporation will be canceled. Capricorn Placer, 10 L. D. 641.

6. Where an application for patent is made by a trustee, the citizenship of the beneficiary must be shown. Capricorn Placer, 10 L. D. 641.

7. A purchase of coal lands from the United States by one authorized so to do, even if for the benefit and at the expense of a corporation unable to make the purchase for itself,

under an agreement by which the land is to be conveyed to the corporation on issuance of patent, is not illegal, as such a contract to convey is not prohibited by the statutes relative to the sale of coal lands. United States v. Trinidad Coal & Coking Co., 87 Fed. Rep. 180. (Reversed, S. C., 137 U. S. 160.)

8. If a patent is void the patentee will not be decreed trustee for any one, but the patent will be vacated. Rose v. Richmond M. Co., 17 Nev. 257; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7. See S. C., 114 U. S. 576.

9. A co-owner need not protect his rights by adverse if application for patent is made in their own names by the other co-owners; but if patent issues to them, they will be declared constructive trustees for the owner whose name is omitted from the application. Turner v. Sawyer, 150 U. S. 578; Brundy v. Mayfield, 15 Mont. 201; 38 Pac. Rep. 1067. *Contra*, Grampian Lode, 1 L. D. 544; Monitor Lode, 18 L. D. 358.

10. The patentee of a mining claim may be declared trustee for one who failed to adverse, if such failure was caused by fraud on the part of the patentee. Seymour v. Fisher, 16 Colo. 188; 27 Pac. Rep. 240.

11. Where a patent is obtained by a literal compliance with the legal requirements for land really belonging to a third person, the patentee may be declared trustee for the person really entitled to the land. Lakin v. Sierra Buttes G. M. Co., 11 Sawy. 231; 25 Fed. Rep. 337.

12. Where one party wrongfully obtains legal title to land which in equity and good conscience belongs to another, whether he acts in good faith or otherwise, he will be charged in equity as a constructive trustee of the equitable owner. Silver v. Ladd, 7 Wall. 219; Johnson v. Towsley, 13 Wall. 72; Rector v. Gibbon, 111 U. S. 276; Sanford v. Sanford, 139 U. S. 642. (See 13 Pac. Rep. 602.) Hardy v. Harbin, 4 Sawy. 549; Lakin v. Sierra Buttes G. M. Co., 11 Sawy. 231; 25 Fed. Rep. 337; Salmon v. Symonds, 30 Cal. 301; Wilson v. Castro, 31 Cal. 420; Bludworth v. Lake, 33 Cal. 256.

13. Decisions of the Land Department may be inquired into to see if a patentee should be declared trustee for another. Johnson v. Towsley, 13 Wall. 72; Warren v. Van Brunt, 19 Wall. 646.

14. If a patent is issued to the wrong party he may be declared trustee for the rightful owner; but if the patent is issued without authority of law it is void, and neither party can claim anything under it. Rose v. Richmond M. Co., 17 Nev. 25; 27 Pac. Rep. 1105; 2 Colo. Law Rep. 7. See S. C., 114 U. S. 576.

15. One suing a patentee to have him declared trustee of the legal title for him must show that he is entitled to the patent, not merely that patent erroneously issued, for that could be material only in a direct proceeding to vacate the patent. Meyendorf v. Frohner, 3 Mont. 282; 5 Mor. Min. Rep. 559.

16. "To charge the holder of the legal title to land under a patent of the United States, as trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the government, and that in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant." Bohall v. Dilla, 114 U. S. 47.

17. Where patent erroneously issues to A. when B. is entitled to it, B. may, by a suit in equity, have A. declared trustee for him. Meyendorf v. Frohner, 3 Mont. 282; 5 Mor. Min. Rep. 559.

18. When the legal title to land has passed from the United States to one party, when under the law and in equity it ought to have gone to another, a court of equity will convert the holder into a trustee for the true owner and compel him to convey the legal title. Rector v. Gibbon, 111 U. S. 276.

19. Where a claim has been abandoned after publication of notice of application therefor, and then relocated by a stranger, and subsequently entered by and patented to the applicant, the patentee will be declared trustee for the relocator. (Strong dissenting opinion.) South End M. Co. v. Tinney, 35 Pac. Rep. 89.

20. Where, prior to application for patent, the owner of a mining claim conveys a part thereof as a town lot, the grantee is not bound to adverse the application, but the patentee takes title subject to a trust in favor of his

grantee. Suessenbach v. First National Bank, 5 Dak. 477; 41 N. W. Rep. 662.

21. One tenant in common of a mining claim promised his co-tenant that he would perform the required annual labor to hold the claim, but fraudulently failed so to do, and relocated the claim for himself. *Held*, that the claim had been legally abandoned, and was therefore subject to the relocation; but that the relocator, by reason of the fraud, might be declared a constructive trustee under the relocation for his co-tenant as to the co-tenant's interest in the original location. Saunders v. Mackey, 5 Mont. 523; 6 Pac. Rep. 361.

22. Where an applicant bases his right to a patent on a relocation, in the making of which he acted as a constructive trustee for the benefit of co-owners according to their respective interests in the original location, such co-owners are not obliged to adverse the application, but may have the applicant declared trustee. Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816.

23. Where a relocation of a forfeited claim is made by one of the owners with the understanding that it is made for the benefit of all, he will be declared trustee for his co-owners. Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816.

24. A co-owner who makes a relocation in his own name to the injury of the rights of his co-owners holds such relocation in trust for his co-owners to the extent of their respective interests. Hunt v. Patchin, 13 Sawy. 304; 35 Fed. Rep. 816.

25. A location made by A. in the name of B. constitutes B. the legal owner, and A. cannot compel B. as trustee to convey to him. Moore v. Hammerstag, 109 Cal. 122; 41 Pac. Rep. 805.

26. Assessment work was not done on a claim, though one owner promised to see that it was done. A third person, in collusion with the owner by whose fault abandonment occurred, relocated and applied for patent. The other owner in the original location adversed. *Held*, that he had no grounds for adversing, but should file a bill in equity against the applicant to have him declared trustee. Doherty v. Morris, 11 Colo. 12; 16 Pac. Rep. 911.

27. If, through conspiracy between one tenant in common of a mining claim and a stranger, the claim is abandoned and is relocated by the stranger, all rights under the original location are lost. Injured owners must proceed in equity to have the relocator declared trustee for their use. Doherty v. Morris, 11 Colo. 12; 16 Pac. Rep. 911.

28. An agent may not defeat the rights of his principal by relocation, and if he does so will be declared trustee under the relocation for his principal. Lockhart v. Rollins, 2 Idaho, 503; 21 Pac. Rep. 413.

STATES.

Alabama.

AN ACT to exclude the public lands in Alabama from the operation of the laws relating to mineral lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided, however*, That all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale: *And provided further*, That any bona fide entry under the provisions of the homestead law of lands within said State heretofore made may be patented without reference to an act approved May tenth, eighteen hundred and seventy-two, entitled, "An act to promote the development of the mining resources of the United States," in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

Approved March 3, 1883. (22 Stat. 487.)
Circular of April 9, 1883, 1 L. D. 655.

1. The act of March 3, 1883, could not deprive a miner who had made a legal location of a mining claim in Alabama, previous to that date, of any right, and he must be permitted to make entry of his claim and procure patent therefor. Cordell Placer, 4 L. D. 476.

2. Alabama land returned as valuable for coal prior to the act of March 3, 1883 (22 Stat. 487), is not subject to homestead entry until offered at public sale. Alice Jordan, 7 L. D. 461; Nathaniel Banks, 7 L. D. 512; 8 L. D. 532 (on review); J. C. Henley, 9 L. D. 178. But see act of March 2, 1889 (25 Stat. 854).

3. The "timber and stone" act of June 3, 1878 (20 Stat. 89), was extended by the act of August 4, 1892 (27 Stat. 348), to the State of Alabama, though the act of March 3, 1883, was not repealed. James Dean, 19 L. D. 389.

Alaska.

(See ALASKA, p. 379.)

AN ACT providing a civil government for Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * * *

SEC. 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land office, and the clerk provided for by this act shall be ex officio receiver of public moneys and the marshal provided for by this act shall be ex officio surveyor-general of said district and the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: *Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further*, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid: *And provided also*, That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

* * * * * * * * * *

Approved May 17, 1884. (23 Stat. 24.)

Arkansas.

4. Public lands in the State of Arkansas, valuable for minerals, may be entered under the mineral land laws. Com'r to Walter C. Cabell, Oct. 19, 1891; Com'r to J. K. Jones, April 28, 1892.

Florida.

5. "Public lands in the State of Florida, containing valuable deposits of minerals may be located and entered under the United States mineral land laws." Com'r to S. T. Smith, Aug. 19, 1891. (See, also, mineral entries in Gainesville, Florida, Land District.)

Indian Territory.

6. The mineral land laws do not apply to the Indian Territory. Com'r to J. T. Shipman, Sept. 8, 1891; Com'r to James G. Miller, Feb. 11, 1893.

Kansas.

AN ACT to exclude the States of Missouri and Kansas from the provisions of the act of Congress entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two, and all lands in said States shall be subject to disposal as agricultural lands.

Approved May 5, 1876. (19 Stat. 52.)

Louisiana.

7. Public land in the State of Louisiana valuable for mineral deposits may be acquired under the mineral land laws. Com'r to W. B. Lindsey, June 15, 1892.

Michigan — Minnesota.

The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any bona fide entries of such lands within the States named since the tenth of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands.

Act of Feb. 18, 1873 (17 Stat. 465); sec. 2345, U. S. Rev. Stat.

Missouri.

8. The State of Missouri was excepted from the operation of the mineral land laws by the same act as Kansas. (See *Kansas.*) Act of May 5, 1876 (19 Stat. 52). See Com'r to E. H. Benham, 1 L. D. 599

Oklahoma.

9. Lands in Oklahoma can be acquired only under the agricultural land laws applicable to the Territory regardless of their mineral or non-mineral character. Sec. 16, Act of March 3, 1891 (26 Stat. 1026).

Texas.

10. The State of Texas is not subject to the public land laws. Com'r to Abner Doubleday, Dec. 17, 1892.

Wisconsin.

11. The mineral land laws are not applicable in the State of Wisconsin. (See *Michigan.*) Act of Feb. 8, 1873 (17 Stat. 465); sec. 2345, U. S. Rev. Stat.

General.

12. A State has the right to authorize the working of mines and to regulate the same. Stokes v. Barrett, 5 Cal. 36 (1855).

13. Tide lands belong to the State, but if they are not disposed of the littoral proprietor may erect wharves which do not interfere with the rights of the public. Case v. Toftus, 39 Fed. Rep. 730.

14. The mines of gold and silver in the public lands are as much the property of the State by virtue of her sovereignty as are similar mines in the hands of private proprietors. Stokes v. Barrett, 5 Cal. 36 (1855).

15. As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines involving easements, drainage and other necessary means to their complete development, and those conditions shall be fully expressed in the patent. Act of July 26, 1866 (14 Stat. 252); sec. 2338, U. S. Rev. Stat.

16. Section 2338, United States Revised Statutes, does not operate as a reservation by the United States of a right of way through a patented mining claim, which may be taken and used by any other miner, whenever it becomes necessary to take and use it in working his mine, upon such terms and conditions as the State legislature may have prescribed. Amador-Queen M. Co. v. Dewitt, 73 Cal. 482.

MISCELLANEOUS.

1. "The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights." *Ex parte* Robinson, 19 Wall. 505.

2. Ore taken from public lands subject to disposal under the mineral land laws is personalty and belongs to the one extracting it. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183.

3. "It is not the practice of this office to make cases special unless shown by affidavit duly corroborated, that extreme hardship would result to the parties interested, or that public interest is such as to demand its advancement." Com'r to L. A. Grant, June 8, 1891.

EXEMPLIFICATIONS OF PATENTS, RECORDS, BOOKS, OR PAPERS.

All exemplifications of patents, or papers on file or of record in the General Land Office, which may be required by parties interested, shall be furnished by the Commissioner upon the payment by such parties at the rate of fifteen cents per hundred words, and two dollars for copies of township plats or diagrams, with an additional sum of one dollar for the Commissioner's certificate of verification with the General Land Office seal; and one of the employés of the Office shall be designated by the Commissioner as the receiving clerk, and the amounts so received shall, under the direction of the Commissioner, be paid into the Treasury; but fees shall not be demanded for such authenticated copies as may be required by the officers of any branch of the Government, nor for such unverified copies as the Commissioner in his discretion may deem proper to furnish. (See secs. 891, 2469, and 2470.) Sec. 461, U. S. Rev. Stat.

* * * * * * * * *

Copies of any records, books, or papers in the General Land Office, authenticated by the seal and certified by the Commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record. (See secs. 461, 2469, 2470.) Sec. 891, U. S. Rev. Stat.

4. A certified copy of a paper signed by the "Acting Commissioner of the General Land Office" is admissible in evidence under section 891, United States Revised Statutes. Murray v. Polglase, 17 Mont. 455; 43 Pac. Rep. 505.

5. "The fact that the locator of a mining claim is under the age of twenty-one years does not render the location invalid." Com'r to Thomas Price, July 1, 1891; Com'r to Samuel Cooper, July 17, 1891; Com'r to N. P. Stilson, June 15, 1893; Com'r to Francis Cunningham, 7 C. L. O. 179; Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182.

6. Previous to 1891 (Act of March 3, 1891, 26 Stat. 1095), mineral lands could not be acquired under town site laws. Pierce v. Sparks, 22 N. W. Rep. 491; Hawke v. Deffeback, 22 N. W. Rep. 480.

7. In a controversy to determine the character of the land the government is a party in interest. Caledonia G. M. Co. v. Rowen, 2 L. D. 719; Magalia G. M. Co. v. Ferguson, 3 L. D. 234.

8. The right to mine and to use water for that purpose must be exercised in a reasonable way, so as not to injure the rights of others. Woodruff v. North Bloomfield Gravel M. Co., 18 Fed. Rep. 573.

9. A relinquishment of land by a mineral entryman must be accompanied by an abstract of title showing him to be the owner of the land at date of the execution of the relinquishment. Com'r to Pueblo Office, Sept. 30, 1895, *In re* Lookout Lode.

10. A local custom of miners allowing a mine owner to tunnel into his claim through a lower claim, recognized. Bliss v. Kingdom, 46 Cal. 651.

11. A right to mine carries with it the incidents to such a right. Tartar v. The Spring Creek Co., 5 Cal. 395 (1855); Clark v. Duval, 15 Cal. 85 (1859–60).

12. The fee demandable by the local land office for filing an application for a mineral patent is $10, whether the application covers one location or more than one. Com'r to Tucson Office, Oct. 4, 1892.

13. The purchase price to be paid for a consolidated claim made of several locations is to be the legal price ($2.50 per acre for placer claims and $5 per acre for lode claims and mill sites) for the total number of acres and any fractional part of an acre. Com'r to Thomas H. White, Jan. 27, 1892.

14. Mineral lands in the restored Uintah Indian reservation are to be sold at $20 per acre. Act of May 24, 1888 (25 Stat. 157).

15. The cession of territory by Mexico to the United States carried with it title to mines. Moore v. Smaw, 17 Cal. 199; 12 Mor. Min. Rep. 418.

16. At the time California was acquired by the United States, the discoverer of a mine was rewarded by an investiture, *ipso facto*, with a perpetual property and ownership of the mine. Castillero v. United States, 2 Black, 1.

17. The power over the public lands is vested in Congress by the Constitution without limitation, and has been considered the foundation upon which the territorial governments rest. United States v. Gratiot, 14 Pet. 526.

18. The location of a mining claim and the maintenance thereof confers a vested right in the nature of a grant from the United States, and the locator may not be divested of such right without it is by the exercise of the right of eminent domain, in which case he must be compensated therefor. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

19. The common law relative to riparian rights is the law of the United States in the absence of statutory enactment. Packer v. Bird, 137 U. S. 661.

20. The common law as to riparian rights is not in force in Nevada. Reno Sm. Works v. Stephenson, 20 Nev. 269.

21. A miner must take the land he claims as he finds it, subject to priorities. Irwin v. Phillips, 5 Cal. 140 (1855).

22. Priority of right will govern where coal land is claimed in good faith by two parties. Paire v. Markham, 21 L. D. 197.

23. Mines belong to the owner of the land, whether the government or an individual. Fremont v. United States, 17 How. 542; United States v. Castillero, 2 Black, 1; Merced M. Co. v. Boggs, 3 Wall. 304. (See 14 Cal. 279.) United States v. Parrott, 1 McAll. 271; Ah He v. Crippen, 19 Cal. 491; 10 Mor. Min. Rep. 367; Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

24. It is a conceded doctrine that mines of precious metals "belong to the eminent domain of the political sovereignty." Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635. See, also, 7 Op. Atty. Gen. 636.

25. Under the Spanish and Mexican laws, an ordinary grant of lands by the government conveyed no title to the mine and minerals within the boundaries of the tract granted. These remain a portion of the pub-

lic domain. (1 Heathfield, Gamboa, 136–138; Ordinances of 1873; Title V, Halleck's Collection, pp. 222, 223; and also Title VI, Article 14, Halleck's Collection, p. 228.) Castillero v. United States, 2 Black, 1.

26. Mines under the Mexican laws, whether in public or private lands, belong to the Supreme Government. Castillero v. United States, 2 Black, 1.

27. The general policy of British, Spanish and Mexican governments relative to mines of the precious metals discussed. Moore v. Smaw, 17 Cal. 199 (1860–61); 12 Mor. Min. Rep. 418.

28. Land is not considered to be surveyed until the township plat has been filed in the local land office. Com'r to John Sutherland, July 14, 1893.

29. A public land survey may be procured under the "special deposit" system by coal claimants. Circular of Aug. 7, 1895, 21 L. D. 83.

30. The failure of government surveyors to segregate mineral from agricultural lands cannot operate to the injury of the rights of occupant miners. Gold Hill Quartz M. Co. v. Ish, 5 Oreg. 104; 11 Mor. Min. Rep. 635.

31. The right to an order for inspection and underground survey of mines discussed. St. Louis M. & M. Co. v. Montana Co., 23 Pac. Rep. 510. (Citing Lonsdale v. Curwen, 3 Bligh, 170; Walker v. Fletcher, 3 Bligh, 172; Blakesley v. Whieldon, 1 Hare, 176; Lewis v. Marsh, 8 Hare, 97; Bennett v. Griffiths, 30 Law (J. Q. B.) 98; East India Co. v. Kynaston, 3 Bligh, 153; Whaley v. Brancker, 10 L. T. (N. S.) 155; Thornburg v. Mining Co., 1 Pac. Law Mag. 267; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Thomas Iron Co. v. Allentown M. Co., 28 N. J. Eq. 77; Bennitt v. Whitehouse, 28 Beav. 119; Blue Bird M. Co. (Limited) v. Murray, 23 Pac. Rep. 1022; Bainbridge on Mines.)

32. A decision by a State court against a United States patent is against an authority exercised under the United States, and may be brought to the United States Supreme Court under the judiciary act. Reichart v. Felps, 6 Wall. 160.

33. The question of fact as to the true course of a vein or lode is not a Federal question. Bushnell v. Crooke M. & Sm. Co., 148 U. S. 682.

34. An affidavit of citizenship made by a mineral claimant is not only good evidence under the law, before the Land Department, but in any proceeding based on Chapter 6, Title XXXII, United States Revised Statutes. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 508. (Motion for new trial.)

35. In California miners may go on unpatented agricultural claims for mining purposes. Stokes v. Barrett, 5 Cal. 37; McClintock v. Bryden, 5 Cal. 97; 63 Am. Dec. 87; Fitzgerald v. Urton, 5 Cal. 308; Burdge v. Underwood, 6 Cal. 46; Weimer v. Lowery, 11 Cal. 104.

36. The legislature of California in 1855 passed an act giving all persons the right to work mines upon the public lands, notwithstanding they might be in possession and enjoyment of another for agricultural purposes. Stokes v. Barrett, 5 Cal. 37 (1855).

37. A miner has no right to dig or work within the inclosure surrounding a dwelling-house, corral, and other improvements of another. Burdge v. Underwood, 6 Cal. 46 (1856.)

38. "The miner having located his claim, is to be treated as an express licensee of the United States, and independent of a purchase from the government of his mining claim, he has, upon compliance with the terms of the act, a right to appropriate the mineral therein contained. A title in fee by patent is offered him, which he may at his pleasure accept or reject." There is no time prescribed within which he shall apply for a patent. Wolfley v. Lebanon M. Co., 4 Colo. 112; 13 Mor. Min. Rep. 282.

39. Previous to 1866, a miner on public land was merely a licensee. Gottschall v. Melsing, 2 Nev. 185; 1 Mor. Min. Rep. 667.

40. Under the mining laws of Congress every valid location of a mining claim is accompanied by the right to the exclusive possession and enjoyment of the soil of such claim. This right is not a mere easement. Upon complying with the terms and conditions of said laws, the locator may have an absolute conveyance of the property. Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. Rep. 574; Talbott v. King, 6 Mont. 76; 9 Pac. Rep. 434.

41. A location of a placer claim, using the names of persons as co-locators who are not intended to have any real interest, but who are to convey their rights after location, is a

fraud on the government. Mitchell v. Cline, 84 Cal. 409; 24 Pac. Rep. 164.

42. The statutory grant to miners of the right to explore and occupy public mineral lands should be liberally construed. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

43. "The mining laws are beneficial laws. They should not be, and are not, by the United States Supreme Court, construed technically." Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404. See S. C., 5 Mont. 600; 6 Pac. Rep. 66.

44. It is the policy of the country to encourage the development of its mineral resources. Steel v. St. Louis Sm. Co., 106 U. S. 447.

45. A *mandamus* will not lie against officers having discretionary power. Decatur v. Paulding, 14 Pet. 497; United States v. Guthrie, 17 How. 284; United States v. Conner, 5 Wall. 563; Litchfield v. Register and Receiver, 9 Wall. 575; Carrick v. Lamar, 117 U. S. 423.

46. Injunction will not lie to restrain the exercise of official discretion. Mississippi v. Johnson, 4 Wall. 498; Litchfield v. Register and Receiver, 9 Wall. 575; Koehler v. Barin, 25 Fed. Rep. 161.

47. A coal claimant who successfully contests the coal entry of another has a preference right of entry of the land involved under the act of May 14, 1880. (21 Stat. 140.) Garner v. Mulvane, 12 L. D. 336.

48. An agricultural claimant who successfully contests a mineral entry and secures its cancellation because of the non-mineral character of the land has a preference right of entry. Dornen v. Vaughn, 16 L. D. 8.

49. A successful coal contestant against a homestead entry has the preference right of entry. Com'r to Seattle Office, Oct. 11, 1894, *In re* Rudd v. Holmstad.

The following act, authorizing the entry of petroleum lands under the mineral land laws, was not approved by the President until February 11, 1897, too late for insertion in its proper place on page 29:

AN ACT to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer-mining laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided*, That lands containing petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this Act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof. Approved February 11, 1897.

PART II.

MANUAL OF PROCEDURE.

MANUAL OF PROCEDURE.

MINERAL DISTRIBUTION.

The public mineral lands in the various States and Territories, with the exception of Wisconsin, Minnesota, Missouri, Kansas, Alabama, Oklahoma, and Texas, are subject to exploration, occupation, and purchase under the mineral land laws of the United States.

The general government has no ownership in the lands of Texas, the title thereto being in the State, by the terms of its admission into the Union, December 29, 1845, and disposed of under State legislation.

The other States in the above list were excepted by express statute, all lands therein being sold as agricultural, without reference to their real character.

The States and Territories in which the public domain is found to contain minerals, arranged in the order of their importance in this particular, are Colorado, California, Montana, Idaho, South Dakota, Utah, Nevada, Arizona, New Mexico, Alaska, Washington, Oregon, Wyoming, Arkansas and North Dakota, the production of the precious metals in Colorado probably exceeding that of the other States combined.

The Executive Department of the government, charged with the sale of the public lands, obtains its information as to the character thereof chiefly through the representations of those who are seeking to acquire title under the laws. It is unable to advise interested inquirers as to the locality of valuable unappropriated mineral lands, for the reason that the discovery of such value is invariably accompanied by an act of appropriation by the fortunate discoverer. The government can, however, tell the *status*, whether appropriated and under what law, or whether unappropriated, of any specific tract, and maps can be compiled from the records showing all approved mineral surveys in any locality.

RESERVATIONS.

Within the various public land States are many tracts of land, often of considerable extent, which are excepted from the operations of the general land laws, such as Indian reservations, National parks, forest reservations, military reservations and private land grants, confirmed and unconfirmed.

The Indian reservations, although numerous, are now of comparatively small area. These are being still further reduced by purchases from the Indians by the United States for the purpose of opening the lands thus acquired to disposal under the public land laws. Generally these lands are disposed of under any of the land laws applicable to the character thereof. An exception was

made in recent legislation relative to portions of the San Carlos Indian reservation in Arizona (Act of June 10, 1896, 29 Stat. 360), and to portions of the Fort Belknap and Blackfeet Indian reservations in Montana (Act of June 10, 1896, 29 Stat. 353–357).

Briefly stated, these acts provide for the purchase of a portion of each reservation, the survey thereof, and thereafter their disposal under the *mineral and coal* land laws of the United States, with a preference right of purchase by those who, prior to the cession of the lands, had discovered and opened mines in good faith.

The largest and most important Indian reservation within the United States is the Indian Territory. This has been much reduced in recent years by the purchase and opening to settlement of what is now called the Territory of Oklahoma. Contrary to the usual rule, the lands in Oklahoma are subject to disposal only under the homestead and town site laws without regard to their real character. Sec. 16, Act of March 3, 1891 (26 Stat. 1026).

The lands remaining in the Indian Territory are not subject to exploration, occupation and purchase under the mineral land laws, and parties entering thereon are liable to ejectment and prosecution as trespassers.

ALASKA.

The Territory of Alaska has recently been brought prominently before the public by reported discoveries of numerous and rich deposits of gold. There is no reason to doubt the existence, in this distant possession, of immense quantities of the precious metal. Little, however, is known of the country, and it would be impossible at this time to give here any detailed information which could be said to be accurate and of any practical value relative to the location of the mineral deposits, the extent thereof, the means of ingress and egress, the climate, the cost of living, etc. No authoritative map has yet been prepared which attempts to give any detailed topography of the interior of the country. The literature regarding the Territory has been of a vague and indefinite character, and such as it is, has dealt principally with that portion thereof along the coast.

By the act of May 17, 1884 (23 Stat. 24), the mineral land laws were made applicable to Alaska, and title to mining claims in the Territory may be acquired by the same procedure as is necessary elsewhere.

NATIONAL PARKS.

The National Parks, such as the Yosemite in California, and the Yellowstone in Wyoming, were established for the purpose of preserving for the people, regions of great natural beauty. The mineral deposits therein are specifically reserved from the operations of the mineral land laws.

FOREST RESERVES.

Within recent years a number of large reservations, called Forest Reserves, have been established under section 24 of the act of March 3, 1891 (26 Stat. 1103), by Executive proclamation in the public land States and Territories, the primary

purpose thereof being the protection of the water supply from diminution by the wanton and useless destruction of the forests in which the streams have their origin. These reservations, under the legislation providing for their establishment, were not subject to the operation of the land laws, but the act of February 20, 1896 (29 Stat. 11), permits the acquisition of mining claims in those reservations of this character in Colorado, under certain restrictions, and it is probable that a law similar in its provisions will ultimately be enacted to cover all of these reservations.

MILITARY RESERVATIONS.

As the necessity for the use thereof ceases, the various Military reservations are being restored to the public domain, the agricultural lands therein after survey to be disposed of under the act of July 5, 1884 (23 Stat. 103). The mineral lands therein, however, become subject to occupation and purchase immediately upon the abandonment thereof by the War Department.

PRIVATE LAND GRANTS.

In those portions of the country acquired from Mexico, particularly in California, Arizona and New Mexico, exist large tracts of land granted by the former government to individuals. They are called Private Land Grants, and under the treaty the rights of the claimants are preserved. Since the cession of this Territory the United States has confirmed many of these grants, issuing its patents therefor.

Many are still unconfirmed and unpatented, generally because of the difficulty of determining to the satisfaction of all interested the proper situation and extent of the land granted. Those finally adjusted have been disposed of in accordance with the terms of the grant, interpreted in the light of the laws of Mexico. These grants were generally pastoral grants, all minerals under the laws being reserved to the State. However, all patents issued by the United States were absolute conveyances, the government making no reservation of minerals therein. Indeed this has never been done in any case, the only exceptions and reservations contained in patents being those relating to easements, and those designed to protect the rights, under the law, of other private proprietors. Hence mineral claimants have no right to prospect and locate mining claims on such patented grants. They are private property, and the minerals therein belong to the owner under the patent. Neither have mining prospectors the right to explore and occupy any portion of the lands within the *claimed limits* of unconfirmed grants. Until finally adjudicated they are in a state of complete reservation and are excluded from the operation of the public land laws.

By the act of March 3, 1891 (26 Stat. 854), a court of private land claims was established for the purpose of adjusting all such grants. Section 13 of this act contains a declaration that all valuable minerals are reserved to the United States, and in effect directs the court to make a finding of facts relative to this particular if the point is raised. No grant has as yet been patented by the Land Department under a decree by this court.

The cases of Moore v. Smaw and Fremont v. Flower, 17 Cal. 199; 12 Mor. Min. Rep. 418, contain an interesting history of the subject of private land grants and state the law as it was prior to the legislation above mentioned.

LOCATIONS MADE PRIOR TO RESERVATION.

It may be stated as a general rule applicable to reservations of whatever character, with the exception of private land grants governed by the treaty with Mexico, that all rights acquired by citizens of the United States prior to the establishment of the reservation are not affected thereby. Accordingly, mining locations regularly made prior to the reservation, and lawfully maintained, are private property, and the owner thereof may at any time which suits his convenience take the steps necessary to secure the fee-simple title. It must be remembered, however, that this only applies to a location which was at such time fully perfected, and even a location of this character, if not maintained, would be treated as abandoned and the land covered thereby would become a part of the reservation.

TIDE LANDS AND LANDS ON NAVIGABLE STREAMS.

Lands below low-water mark on the tide lands and on the banks of navigable streams belong to the States in which they are situated, and the United States will not recognize mining claims thereon. Whether lands are tide lands or whether streams are navigable is a question of fact to be determined in each particular case.

The right to use such lands depends upon the local laws applicable to the place. A mining claim may extend across and cover the bed of a stream not navigable. If the claim is taken by legal subdivisions, the description thereof according to the government survey will control. In such a case, if the stream is meandered (that is, if the subdivisional surveys extend only to the banks and not across the stream), the ordinary rules as to riparian rights apply.

STATE GRANTS.

The United States has granted to the several States sections 16 and 36 in each township for the common schools, excepting such as are mineral, and for the acreage lost in this way the State may select an equal quantity of unappropriated lands as indemnity. In lieu of a place grant of sections 16 and 36, the State of Nevada has been granted two million acres of public land.

This grant is adjudicated in the following manner: The government surveyor in running the lines of the subdivisional surveys is required to describe in his field notes the character of the lands over which his lines are extended. This statement is usually to be found in the "General Description" at the end of the field notes of the survey of each township, and is called the "return" of the surveyor. The public lands are *prima facie* of the character noted, and the State may select lands in lieu of those sections of its grant returned as mineral, or may, if it so elects, disprove the return under paragraph 110 of the mining regulations. Although mineral lands are excepted from the grant, a

time is fixed at which the State's title becomes absolute, no matter what the character of the land may subsequently be found to be. If the subdivisional survey was made prior to the admission of the State, this point of time is the date of the admission of the State to the Union; if such survey was made after the admission of the State, the grant to the State becomes absolute at the date of the approval of the survey if the lands were not then known to be mineral.

In case an application for patent for a mining claim is presented covering any lands within sections 16 and 36, returned as non-mineral, if an examination of the same discloses that the claim was located prior to the date when the State's right attached, if at all, the application is received and placed of record, and the proper State official notified and allowed thirty days to show cause why patent should not be issued on such mineral application.

Should the application disclose that the mining claim was located after the date when the grant became effective, if at all, the mineral claimant is required to make a *prima facie ex parte* showing that the land claimed by him was known to be mineral at or prior to the established date. Should such showing be made, a rule is laid upon the State to show cause as above noted, but should the mineral claimant fail to make out a *prima facie ex parte* case his application is finally rejected.

In all cases where the State fails to appear and answer to the rule after due notice, the application for mineral patent is passed in this particular; but if a showing is made which raises the issue, a "hearing" or trial before the local land office is had to determine the following questions: (1) Is the land mineral? and if so, (2) was it so known at the date the grant to the State took effect?

RAILROAD GRANTS.

The United States has also granted to many railroad corporations immense quantities of land, in alternate sections on each side of its road from five to forty miles in width, mineral lands, other than those valuable for coal and iron, being excepted.

The exception is effective as to all lands found to be mineral at any time prior to the date patent issues, or to certification when that passes title.

Of these granted alternate sections the companies make lists of selections, describing the tracts according to the government subdivisional surveys. These lists are filed in the local land office and forwarded to the General Land Office, where they are critically examined. A clear list is then made up of lands not returned, applied for or alleged to be mineral, which is transmitted to the Secretary of the Interior for patenting, or certification as the case may be, under the law.

Under the practice a list is made up of all the lands returned, claimed or alleged to be mineral, as well as all lands within six miles of mining claims, and notice of the selection of said lands is required to be published thirty days, after which testimony is submitted at the local land office as to the character thereof. Any persons having claims, or familiar with the character of the lands published, are invited to appear and testify concerning the same.

Inasmuch as many mining claims are held under possessory title alone, and

there is no record thereof in the Land Department, claimants are at fault if they do not advise the government of their claims. A brief letter addressed to the Commissioner of the General Land Office, giving the section, township and range, will be sufficient to prevent any final disposition of the land to a railroad company until the one alleging the mineral character of the land has an opportunity to be heard. The better plan, however, is for the mining claimant to keep himself informed of the *status* of the land by frequent examinations of the records of the local land office, or those of the General Land Office, and, upon the filing of any selection list covering the tract in which he is interested, to immediately file a duly corroborated protest under oath setting forth the nature of his claim. This would insure the adjudication of all claims prior to any final disposition of the land. See Departmental circular of July 9, 1894 (19 L. D. 21), and paragraphs 108 to 118 of the mining circular of Dec. 10, 1891, printed on pages 337 and 338 hereof.

The grant to the Northern Pacific Railroad Company in Montana and Idaho is being adjusted, as to the mineral character of the lands, under the act of February 26, 1895, and claimants must protect their rights in accordance with the terms thereof. Circular instructions, 20 L. D. 350.

AS TO THE CHARACTER OF LAND.

By section 2318, United States Revised Statutes, all "lands valuable for mineral shall be reserved from sale, except as otherwise expressly directed by law." Act of July 4, 1866 (14 Stat. 86), re-enacted May 10, 1872 (17 Stat. 91).

It has been held that the character of land is open to question until the issuance of final certificate of entry for an agricultural claim, but that a discovery of valuable mineral after the date of such certificate will not affect the title under the agricultural entry.

According to section 2319, United States Revised Statutes, all public lands in the States subject to the mining laws are open to exploration, occupation and purchase under these laws if mineral.

The miner has, therefore, the right to prospect, even though his operations are carried on upon land settled and improved and claimed as agricultural, provided final agricultural entry has not been made. He has no right to damage the improvements of the agricultural claimant, or to interfere with his legitimate use of the land for such purposes.

Should the agricultural claimant believe himself damaged by the acts of miners or prospectors, he should apply to the local courts for relief. The executive branch of the government will not exercise jurisdiction to settle disputes relative to the right of possession between rival claimants. It is only when one or the other seeks to acquire the legal title that action will be taken by the Department of the Interior, and then only to determine to whom, under the law, patent should issue. To illustrate: When an agricultural claimant submits final proof, he is required to make a *prima facie* showing that the land claimed by him is non-mineral. If the proof on this point is not disputed and there is compliance with law in other particulars, his final entry is allowed as a matter of course. Should it be alleged, however, that the land is mineral,

by affidavits duly corroborated, a "hearing" to determine this issue, at which both parties to the controversy may appear and submit testimony, is held, and thereafter such decision is rendered as the facts disclosed by the evidence may warrant. It often happens that protests, alleging the mineral character of lands, are filed after final agricultural entry has been allowed thereon. To raise an issue, such protests must be to the effect that the lands were of known mineral value *prior* to the date of final agricultural entry. Likewise an agricultural claimant may contest an application for mineral patent, and it may be stated as a general rule that the Department will not take any measures to determine the character of the public lands, whether mineral or non-mineral, until an application for a grant of the legal title thereto is submitted.

It should be remembered in this connection that jurisdiction to determine the character of the public lands is vested exclusively in the Executive, acting through the Land Department, the judgment of which is final. The courts may determine the right of possession. Such action, however, does not carry with it the legal title, although the right of possession and the right to the legal title may be in the same individual.

As is stated in another place, a valid location of mineral land confers a vested right, and the mining claimant whose land has been patented to a railroad company, to a State, or to an individual as non-mineral through mistake, or upon fraudulent representations, may still by a direct proceeding in the courts have his rights enforced as against the patentee.

It may be stated that in all cases where the government is under equitable obligations to protect the rights of the aggrieved party, it will institute proceedings in a court of equity to have the improvidently issued patent set aside, to the end that it may thereafter grant the legal title to the one to whom it rightfully belongs.

LOCATION.

Under the statute (sec. 2320, U. S. Rev. Stat.) the first step in the acquisition of title to the mineral lands of the United States is *discovery*, the second *location*, the third performance of annual labor, commonly called "*assessment work*," and the fourth and last *entry* or *purchase*.

The first three confer upon the miner a conditional or qualified title subject to forfeiture by failure to comply with the conditions; the last, if there be no defect or irregularity in the proceedings, vests in the claimant a title which the government is bound to carry into patent. The first title is possessory, the second equitable, and the last carries with it the whole title of the government.

The holder of a possessory title under the mining laws is not bound to apply for patent, or to pay for the use of the land. So long as he does not do so, however, his title is somewhat uncertain, and he may lose a valuable property through the negligence or bad faith of his agents.

If the ground claimed has not already been appropriated by a prior claimant, and is of the character alleged, by the successive steps of discovery, location and annual expenditure, the miner has acquired a vested right, a property capable of being transferred, sued for, etc., as other real estate, subject only

to the paramount title of the United States, and the courts will protect him in the full and free enjoyment thereof.

The estimated mineral area is sixty-five million acres. Since the passage of the first mining law twenty-seven thousand patents have been issued, covering on an average probably twenty-five acres each, and it is estimated that there are at this time between four and five hundred thousand valid mineral locations. According to this estimate the greater number of miners prefer to hold their claims under possessory title.

The laws of the different States and Territories, and the regulations of the various mining districts, differ greatly as to what constitutes a *discovery* of valuable mineral, and the courts are no more uniform in their opinions on this subject.

The National statute merely requires that a discovery of valuable mineral be made, and any evidence which establishes the existence of a vein or lode of quartz or other rock in place carrying one or more of the minerals, or of a placer deposit valuable as a mine, would be satisfactory.

The statutes of the United States, however, in matters affecting the possessory title (secs. 2320 and 2324, U. S. Rev. Stat.), recognize the right of the State or Territory or Mining District to make laws or regulations determining the details of discovery, location and annual labor within certain limitations. These limitations are: (1) That the location must be distinctly marked on the ground so that its boundaries may be readily traced; (2) that all records of mining claims shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to a natural object or permanent monument, as will identify the same; and (3) that on each claim located at least one hundred dollars' worth of labor shall be performed or improvements made during each year.

The order in which mining laws are authoritative are: first, National; second, State or Territorial; and third, Mining District; and the last two are of no effect if they attempt to regulate matters in which jurisdiction is not conferred by the sections of the mining act heretofore named.

The miner having made a discovery, and being desirous of securing the same to himself, should therefore inform himself as to all such laws and proceed in compliance therewith. Should there be a conflict of law or of regulation, he should be governed by that of highest authority.

MINING DISTRICTS.

It may be well at this place to note briefly the origin, method of organization and jurisdiction of the local mining district.

Long before there was any National legislation relative to the mineral lands upon the public domain, systems of local mining laws, growing out of the necessities of the miners, had been established where rich mineral discoveries had brought together large numbers of prospectors. These regulations were framed to fit the needs of each particular locality.

This matter of local organization had its greatest development in California, and the regulations adopted in other sections of the country were largely modeled upon the California methods.

Many mining district organizations were in existence at the date of the mining act of May 10, 1872, and Congress therein recognized them and authorized their continuance. It is not seen, however, what good purpose is subserved by the perpetuation thereof. All of the mining States have adopted more or less complete mining codes, and the organization of local mining districts is gradually being abandoned. It would seem that since the passage of the United States mining statutes, and the legislation supplemental thereto by State legislatures, there exists no necessity for the local mining district, and the process of acquiring title to the public mineral lands would be relieved of many vexatious complications if the organization thereof were abandoned altogether.

The general government has no jurisdiction over mining districts; it exercises no supervision over the regulations thereof, and when an application for patent is presented, if the proceedings appear to be in accord with the United States statutes, the case is passed unless it be specifically alleged that some material and lawful State law or mining district regulation has been ignored or violated by the claimant. In such event an investigation might be made and such action be taken as the facts warrant. For a full exposition of the rights and powers of a local mining district, the reader is referred to this subject in the Digest, page 70.

However, should the miners of any community deem it necessary or desirable to establish an organization of this kind, a common form of procedure is to call a public meeting for that purpose. This meeting should adopt a set of rules prescribing the officers of the district and defining their duties; fixing the boundaries of said district and giving a name thereto, and regulating the "location, manner of recording, and the amount of work necessary to hold possession of a mining claim," within the limitation of the statute. The officers provided for by the regulations should then be elected, who will thereafter discharge the duties prescribed. The principal officer of a mining district is the Recorder, whose duty it is to make a record of all locations, and of all other papers affecting the title to mining claims within the district. Inasmuch as the district organization is apt to be abandoned, and the books lost or destroyed, it sometimes becomes a matter of much difficulty to furnish a complete chain of title by means of a proper abstract, and claimants are frequently forced to establish title by proceeding under section 2332, United States Revised Statutes. All State governments have legislated with great care on the general subject of real property, and have provided that all transactions affecting the title thereto shall be made a matter of public record, usually with the county recorder, in permanent volumes of records provided for that purpose, and kept in a safe place. Were it a general requirement that all papers affecting titles to mining claims be recorded with the county recorder, it would be possible at any time to procure an abstract showing the condition of any title.

The miners acquire a complete possessory title by discovery, location and continued possession by the performance of the annual labor prescribed by statute. This possession does not necessarily mean occupancy of the premises, and the several acts of appropriation named may be performed by an agent.

The statute of the United States merely prescribes that prior to the location of a mining claim a discovery of valuable mineral shall be made. Most of the States and Territories require the discoverer to sink a discovery shaft, and in those States in which no fixed time is prescribed, a reasonable time is allowed within which to complete the location.

Upon making a discovery the prospector should post a notice at the discovery point briefly describing his claim, and claiming the time allowed by State statute or mining district regulation for perfecting his location, signing his name thereto and the date. No particular form of notice or manner of posting is required in any of the States. The purpose of this notice is to protect the miner while he proceeds to take the other steps prescribed by State law to complete his location. The second step is to sink the discovery shaft or other working.

LODE LOCATIONS.

If the claim is a vein or lode claim he is permitted to take a tract fifteen hundred feet long by six hundred feet wide by the United States statute, unless limited by prior adverse rights. This width is in some places limited by State statute. The Colorado statute limits the width to one hundred and fifty feet in Gilpin, Clear Creek, Boulder and Summit counties, and to three hundred feet in the other counties of the State. In all the other States and Territories the full width of six hundred feet is allowed, unless there is a limitation prescribed by mining district rules.

The location should be laid along the strike or course of the vein, and as the law allows but three hundred feet on each side of the center of the vein, the location of the claim is void as to any excess over that amount.

The top or apex of the vein must be within the claim located, otherwise the claimant will have no right to work the vein on its dip outside of the surface lines of his claim.

The end lines of the claim must be parallel. Within these limitations as to width and parallelism of end lines, the claim may assume any form the miner finds desirable or necessary. It may take the full width, six hundred feet, at one end and be extremely narrow at the other. Great care should be exercised in the matter of end lines. While, according to some of the decisions, a claim might be patented with non-parallel end lines, yet such a condition would prevent the claimant working the vein should it dip beyond his side lines — a very important consideration in most cases.

MARKING.

After the prospector has made a discovery upon the apex of the lode and has determined the course or strike thereof, he is ready for the next step, which is the marking of the boundaries thereof. Inasmuch as the various State laws differ in this particular, it will be sufficient in this connection to call attention to the Colorado statute, which requires six substantial stakes, one at each of the four corners and one in the center of each side line, if the form of the location is a parallelogram.

The stakes or monuments set should be carefully maintained, because, if destroyed, an error in the description recorded may become of serious consequence.

The law makes no distinction as to the persons who may locate mining claims, further than to require that they be citizens of the United States or to have declared their intention to become such. Accordingly a minor, a woman, married or unmarried, an association or a corporation may locate either in person or by agent. Further, there is no restriction as to the number of locations an individual, an association or a corporation may make, provided the conditions are complied with as to each location.

RECORD.

After the discovery has been made, and the claim properly marked upon the ground, the State statutes or local mining regulations usually require that within a specified time a record be made thereof either in the office of the county recorder or of the mining district recorder. The time allowed may be determined by consulting the local laws. While the Federal statute does not in express terms make this matter of record obligatory, yet it may be said that section 2324, United States Revised Statutes, impliedly provides therefor by giving authority to make this requirement. Inasmuch as every applicant for patent is required by the regulations of the Land Department to furnish a certified copy of the location certificate on which the application is based, and also to furnish an abstract tracing his title from such location, it would seem to be contemplated by the Department that such record be made. It may be remarked, however, that the courts hold that there is no requirement of United States law as to recording notice of a location.

The process of recording may be in the following manner:

Having marked the boundaries of the claim by the monuments noted, the locator should draw up a description giving the name of the lode (any name he chooses to adopt), the date of location, the courses and distances from corner to corner, beginning with corner No. 1, until the exterior boundaries close, with a statement of the width claimed on each side of the vein. The written description should contain a reference to some natural object or permanent monument by reference to which the *locus* of the claim may be fixed.

The courses and distances should be determined with extreme care, and the certificate should agree, as nearly as is practicable, with the monuments on the ground. The natural object or permanent object should be, as indicated, of a conspicuous and permanent character, and, if possible, should be some regularly established mineral monument or a corner of the public survey within a distance of two miles. Lastly, the certificate should contain the date of discovery, the *locus* by section, township and range and county when possible, and be signed by the locator or locators.

This paper should be executed in duplicate, one copy to be posted in a conspicuous place, preferably at the discovery, the other to be made a matter of record. Even though a State or Territorial statute does not require it, a copy

should be made of record in the office of the county recorder as a measure of precaution.

The miner has every reason to be exact in all the steps taken to perfect his location. Should his claim develop into a valuable property, he may find a swarm of locators all around him. Locations will be made overlapping his claim in all directions, and the discovery of the least flaw in his title will be the signal for the onslaught of a host of adverse claimants.

Although a location may not be perfected by record within the time specified by local statute or regulation, yet if completed at any time before the intervention of a valid adverse right, it has been held to be good.

If one can take a copy of a location record and therefrom exactly locate the claim upon the ground, finding all the corners and monuments described therein, both the marking on the ground and the certificate thereof would appear to be sufficient.

PLACER LOCATIONS.

Placers, according to section 2329, United States Revised Statutes, include all forms of deposit, except veins of quartz or other rock in place. In the Digest under the title *Veins* may be found numerous definitions; and under the title *Minerals* may be found a list of mineral substances.

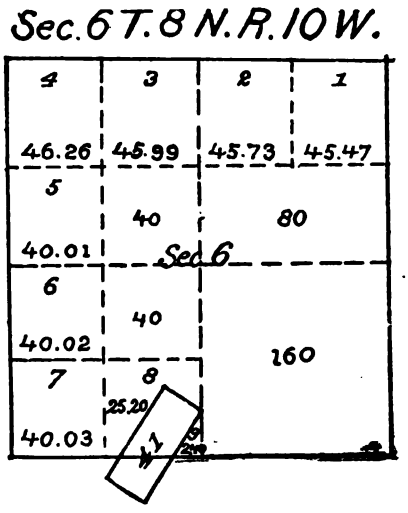
An examination of the cases will enable the prospector to determine whether his discovery has been classified as mineral under the mining laws, and if so whether the land containing it should be located as lode or placer.

In most particulars the method of making a placer location is the same as that pursued in case of lode claims. It is required, however, that when on surveyed lands, placers shall conform as near as reasonably practicable to the United States system of public land surveys. When the ground it is desired to locate can be taken in this manner, the location notice need merely describe the tract by legal subdivisions as in agricultural cases, and no markings of the corners would appear to be necessary under the decisions of the Land Department, it being held that such a location is sufficiently definite under the statute to give lawful notice of the extent of the claim.

For purposes of convenience in making locations in this manner, section 2330, United States Revised Statutes, provides that legal subdivisions of forty acres may be subdivided into ten-acre tracts, and a location notice describing the claim as embracing the E. ½ of E. ½ of S. E. ¼ of S. E. ¼ of the appropriate section, township and range would be regular as to this particular.

Anyone familiar with the system of public land surveys knows that, owing to the variations of the compass and the convergence of the meridian lines, the townships, while in theory six miles square, are in fact not perfect squares of these dimensions. The north and west tiers of sections, where the survey is progressing to the north, as is the case with most of the public lands where mineral is found, contain the irregular areas. An examination of any township plat will show along the outer edge of all these north and west sections, a line of tracts containing more or less than forty acres. These are described

as lots, each one being given a number, beginning with No. 1 at the right of each section and continuing in successive numbers to the left.



The extreme northwest subdivision should be located as lot 4, containing 46.26 acres. If the location covers but a part of lot 4, the tract taken should be described by metes and bounds, the lot not being divisible as provided by section 2330, United States Revised Statutes. In this case an application for patent would have to be based upon a survey by metes and bounds as in applications for lode claims.

Legal subdivisions of forty acres are often rendered fractional by the segregation of lode claims as indicated by the above diagram. In such cases the United States Surveyor General designates the portions remaining of the legal subdivisions by appropriate lot numbers with their areas, the records of the Land Department are noted accordingly, and the same rule applies here as illustrated by lot 4.

When the location cannot conveniently be made to conform in description to the public subdivisional survey, because of the distribution of the minerals, as when they are found along the course of a tortuous stream, the location should be made by metes and bounds. Care should be exercised as to this particular by the locator, as a claim may be rejected by the Land Department if located by metes and bounds and no good reason appears for failure to make the claim conform to legal subdivisions.

No location of a placer may, since the passage of the act of May 10, 1872, embrace more than twenty acres for one individual, and an association may locate not to exceed twenty acres for each individual therein, the maximum area which may be included in one location being one hundred and sixty acres.

A corporation, being in law an individual, can probably include but twenty acres in one location. It has been held by the Land Department that a discovery must be shown on each twenty acres embraced in a placer location.

A placer location on unsurveyed lands must, as to description, be practi-

cally the same as a lode or vein location, with the modifications rendered necessary by the differences in the character of the claims, and the requirements as to marking, posting, record and annual labor are also the same.

MILL SITE LOCATIONS.

Section 2337, United States Revised Statutes, provides for the patenting of lands as mill sites. Nothing is prescribed by the statute as to the manner of locating such claims, but the practice has been to make a location similar in form to that of placers.

The land embraced in a claim of this character must not exceed five acres in area; must be non-mineral in character; be non-contiguous to a lode, and be used or occupied for mining or milling purposes in connection with a lode, or have a mill or reduction works thereon. Title depends upon the character of the land and upon use and occupancy for the purpose indicated.

ANNUAL LABOR.

After perfecting the location of his claim as indicated in the preceding paragraphs, the locator has good title against the world conditional upon a compliance with the provisions of section 2324, United States Revised Statutes, relative to the performance of annual labor.

A legal location maintained by the performance of the required labor, commonly termed "assessment work," confers a vested right of which the claimant cannot be deprived even by the general government except by the exercise of the right of eminent domain. It has been held that land embraced within a valid, legally maintained mining location will be excepted from a reservation established by executive proclamation.

Annual labor was not required by statute prior to the act of Congress of May 10, 1872, and the matter was regulated solely by the mining district regulations. Section 2324, United States Revised Statutes, is a recognition of such local district regulations, and is admirably adapted to promote the development of our mineral resources, as well as to prevent any monopoly of mining ground, the requirement serving to prevent the location of land as mining claims unless the locator has sufficient faith in the character thereof to justify expenditure in its exploitation.

The statute provides for a certain expenditure on claims located prior to May 10, 1872, and on claims located subsequent to that date. Inasmuch as the great majority of the claims located prior to that date have been passed to patent or have been relocated under said act, it is deemed unnecessary to here consider such claims.

For such as claim under locations made prior to May 10, 1872, the Digest bound herewith contains numerous references to decisions involving the questions likely to arise in the particular case.

Under the law as it now is, locations are treated as entireties, and the expenditure of $100 may be made upon any part thereof. When a number of contiguous locations are held in common, an expenditure of an amount equal

to $100 for each may be made upon one or more of such locations, provided such expenditure tends to the development of the claim as a whole. That such expenditure is of benefit to each location must clearly appear, otherwise the locations on which no work is done may be successfully attacked on the charge of abandonment. Work done outside of the claim, if done for the development thereof, has been accepted as sufficient.

Where a trial is had on the issue of abandonment, the one alleging it has made out a *prima facie* case if he has shown that no work was done during the period in question *upon* the claim. If the one denying the charge of abandonment depends upon work done *outside* of the claim, he has the burden of proof.

Inasmuch as the statute requires an annual expenditure to the amount of $100 on each location, and each location is treated as an entirety, and not divisible, it follows that, even though one or more of several locators fail to contribute their respective portions of such amount, the others must perform the whole labor, or the claim will become subject to adverse relocation. The ones complying with this conditions have a remedy, however, prescribed by said section 2324, United States Revised Statutes, which will be more fully considered hereafter.

Any expenditure in labor or improvements which directly facilitates the development of the claim may be counted as a compliance with this condition of the statute; but the work must be such as tends with reasonable directness to the development of the claim. Hence, it has been held that building a miners' cabin outside of the claim cannot be considered as labor done upon or for the benefit of the claim.

In another case, where an ore-house erected upon the claim was alleged to be a mining improvement, it was held that the claimant must show it to have been placed there for the development of the claim.

In still another case it was decided that wages paid a watchman who had charge of idle works upon a mining claim might be properly considered as constituting the required annual expenditure for the benefit of the claim.

It has been frequently attempted to fix by mining district regulations the value of labor; for example, that each foot of a shaft shall be counted as worth ten, fifteen or twenty dollars. Values cannot be arbitrarily fixed by local statute or regulation, however, but are determined by the market price, in the community, of labor or material. The tribunal having this question before it would ask: What was the fair value in the district at the time the expenditure was made?

The Federal statute of January 22, 1880, amended section 2324, United States Revised Statutes, by providing that the first annual expenditure upon all unpatented mineral claims shall be made during the year commencing *January first* after the location is made. To illustrate: If A. made a location October 1, 1896, his first annual expenditure in labor, or in improvements, must be made between January 1 and December 31 of the year 1897. He will have the whole of the year 1897 in which to do the work and need do none during the remaining portion of 1896. It is not necessary to do the work in any particular part of the year 1897, it being necessary solely that at 12 o'clock, midnight, Decem-

ber 31, 1897, he stands ready and able to prove that work for 1897 has been done.

Failure to do the prescribed work does not necessarily result in a forfeiture. The claimant may resume work during the succeeding year, and if he does so before the intervention of a valid adverse relocation, his rights are saved; and the courts have gone to the extent of holding that if, before an adverse relocation, he does sufficient work to show his good faith, he may have the whole year in which to complete labor to the required amount of one hundred dollars. It is dangerous, however, to take any chances, and the locator is wise if he does an amount of development work in good season, as to the sufficiency of which there can be no question.

The fact that work done has not been paid for by the claimant does not affect its sufficiency under the law, the government not inquiring into the relations between employer and employee, and failure to do work because of the threats of violence of adverse claimants in possession has been held by the courts to be sufficient to excuse failure in such particular, at least as against a relocation by those making the threats or guilty of the violence by reason of which the claimant was deterred from performing the required labor.

As the patent, when issued, relates back to the date of entry, it has been held that the annual labor need not be done subsequent to the date of such entry and payment for the land.

Past large expenditure, although thousands of dollars in excess of the year's requirements, cannot be counted as labor for succeeding years.

FORFEITURE.

Failure to perform the annual labor prescribed by section 2324, United States Revised Statutes, does not, as has already been stated, necessarily operate as a forfeiture of the claim. The land, however, becomes subject to relocation by others if work is not resumed, and, if such relocation is made, forfeiture then results, it being held that in order to have a forfeiture take place there must be some person, natural or artificial, who is entitled to the benefit of the forfeiture when it occurs, *i. e.*, a new claimant.

Where there is a resumption of work it must be of a substantial character, and be *bona fide* and not merely formal, and in any controversy arising upon the point, the court will necessarily have to decide whether the work performed was done solely with a view of preventing relocation, or with an honest intention to comply with the letter and spirit of the mining laws. This intent will be determined by the acts of the claimant.

When work has not been done for any one year, the land covered by the location becomes, for all practical purposes, again public domain, and the prospector thereon is not a trespasser, but has the right to explore and occupy, the same as he has on other vacant public lands.

A relocation of abandoned ground must be made with all the formalities attending the location of ground which had never before been claimed as mineral. The relocator may, however, adopt as his own the discovery and markings of the original location, although under some of the local laws and

regulations he is required to sink the discovery shaft deeper, thereby practically making a new discovery.

In all essential respects it is a new location, and it would appear to be unnecessary to make any mention in the location notice of the original claim, as the relocator gains no rights or title therefrom and is not permitted to avail himself of any of the expenditure made by the former claimant. Should his title ever be questioned by the prior locators, he could plead location thereof as abandoned ground, and his case would be just as strong as though he had set up in his own location notice a full statement of the prior claim, the abandonment thereof, and his relocation. As a matter of fact, if he specifically sets up such prior claim in his location notice, he might be held to thereby admit the regularity thereof, and his *only* defense would be forfeiture of such original location because of failure to perform the annual labor thereon.

Abandonment under the mining laws does not result until the expiration of the calendar year in which the annual labor should have been performed, and a relocation made before the expiration of that time is void, even though prior to such relocation the original claimants had left the claim with no intention of returning.

To illustrate: A., the owner of a mining claim, leaves the ground, say in June, without having done any work during the year. B. makes a relocation in December. A. does not resume work and C. enters and makes a formal location, in all respects regular, January 1st. C.'s location is good as against that of B., B.'s location being void *ab initio*, having been made when the ground was not subject to relocation.

Until the enactment of statutes governing the subject, it was held in the earlier mining cases, notably in California and Nevada, that the common-law doctrine relating to the abandonment of property was applicable to mining claims, upon which idea was based the theory that in mining law there existed a distinction between the abandonment of a mining claim and a forfeiture thereof. The distinction made was that abandonment was the act of the party in renouncing, in effect at least, all claim or right to the property, while forfeiture was only completed by relocation of a claim upon which the prescribed expenditure had not been made.

Under the existing law, however, it would be difficult, if not impossible, to draw any distinction between the two terms.

CO-OWNERS.

A co-claimant may relocate a claim in his own name after the same has been abandoned because of failure to perform the annual labor, although the preferable course for him, if he deems his title worth maintaining, is to make the required expenditure, and, if his co-owners fail to contribute their proper proportion of the amount, to proceed in the specific manner prescribed in section 2324, United States Revised Statutes, for such cases. This procedure is to make a formal demand for the amount due, either by personal notice in writing, or by publication of such demand for ninety days in the newspaper published nearest the land.

If personal notice in writing is given, and no payment made, the forfeiture becomes final in ninety days thereafter; if such notice is given by publication, the forfeiture results ninety days after the date of last publication.

The Federal statute prescribes no method of making proof of forfeiture, nor, in making proof upon application for patent before the Land Department, has such proof ever been required, for the reason that it has been held that a co-owner whose name is omitted from an application for patent must protect his rights by filing an adverse claim under section 2326, United States Revised Statutes. Should he do so, the local courts would pass upon the validity of his claim, and would decide whether his interest had been forfeited under the statute.

Some of the States require, in case of personal notice, that an affidavit by the claimant setting forth the fact of such notice and that no payment had been tendered thereunder shall be recorded; and that in case of notice by publication, a copy of the notice as published, having attached thereto the publisher's affidavit, and an affidavit by the claimant as to non-payment, be recorded.

The courts view with strong disapproval, however, any acts upon the part of one co-owner savoring of fraud or collusion by means of which a claim is subject to relocation by third persons to the injury of the other owners, and if the claim is not represented by reason of bad faith on the part of one of several co-owners who has been intrusted with the duty, and by reason of that fact is relocated by a third person, acting in collusion with such co-owner, the relocator would, without doubt, be adjudged a trustee under the relocation, for the use and benefit of the original owners.

APEX—DIP.

The statutes confer upon the mining claimant certain further rights which it is necessary to notice under a discussion on the subject of location. Among these are the right to work the lodes claimed, upon their dip, and the relative rights of claimants to intersecting veins whether upon the strike or upon the dip. Sections 2322 and 2336, United States Revised Statutes, regulate these rights. The subject is much involved, the courts being by no means uniform in their decisions, and it is the purpose here to point out only the ordinary incidents as to which the law seems to be well established.

The matters relating to apex and dip of veins have no application to placer and mill site locations, the title granted thereunder being the right to all of the land embraced within the exterior boundaries thereof, extended perpendicularly downward to the center of the earth.

The conditions prescribed by section 2320, United States Revised Statutes, are that no location shall exceed six hundred feet in width by fifteen hundred feet in length; that a discovery of the vein or lode shall be made, and that the end lines shall be parallel. The extent of the rights acquired by a location fulfilling all these conditions is fixed by sections 2322 and 2336, United States Revised Statutes.

The term "apex" means the top of the vein, that part thereof nearest the

surface of the earth. The apex of a vein is not necessarily a point, but may be a line of great length.

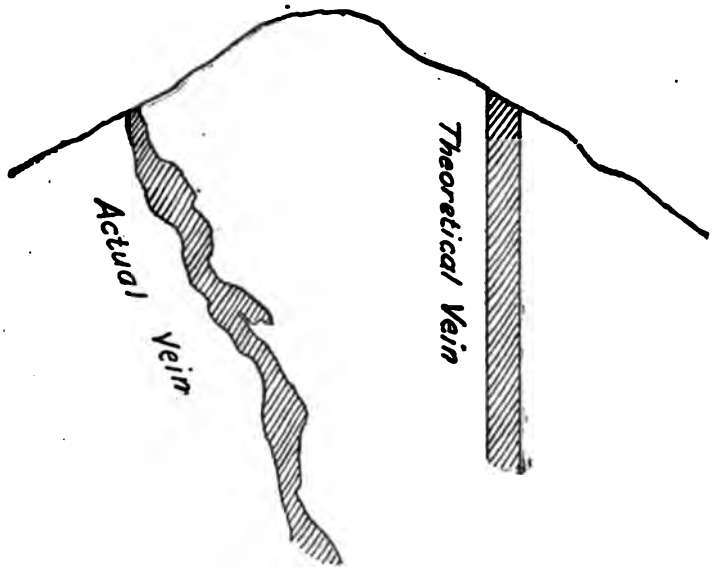
Section 2322, United States Revised Statutes, grants to the owner of a location made in compliance with section 2320, United States Revised Statutes, these rights:

1. The right of exclusive possession and enjoyment of the surface ground embraced within his location, and

2. The right to work all lodes or veins the tops or apexes of which lie within such surface ground, throughout their entire depth, although they may so far depart from the perpendicular in their course downward as to extend outside the vertical side lines of the location.

Theoretically, a vein or lode extends perpendicularly downward indefinitely. Actually, it usually inclines more or less from the perpendicular, which inclination is called its dip, and ordinarily, if pursued to a great depth, it will be found to pass beyond the side lines of the location, extended vertically downward, into adjoining ground.

It is the right to work this last portion of the vein which section 2322, United States Revised Statutes, grants. The figure illustrates the theoretical vein and the vein as it is usually found to exist.



Some veins have practically a horizontal formation. Such veins may be said to have no apex, and the locator thereon is entitled to no extralateral rights, although there may be an apparent departure of the vein from the horizontal. Such veins are called "contact" or "blanket" veins, and the courts generally have refused to recognize apex rights under section 2322, United States Revised Statutes, though a careful study of the cases wherein the right to work a lode outside of the surface boundaries of the claim was denied shows that in every particular case the party claiming such right had failed to establish, by satisfactory evidence, the existence within his claim of the apex of the lode.

The courts have not *expressly* held that extralateral rights could not be obtained by a locator on a "blanket" vein or lode.

Accordingly, before any right to work a vein beyond the surface boundaries of the claim can be established, it must be shown that it has an apex within such surface boundaries. The burden of proof is upon one asserting a right to extract and remove ore from a vein outside the surface limits of his claim to show that he has a valid location upon the apex of the vein he is working; that the vein is continuous (for definitions, see Digest); that the end lines of his claim are parallel, and that there is no prior valid location on that exterior portion of the lode claimed.

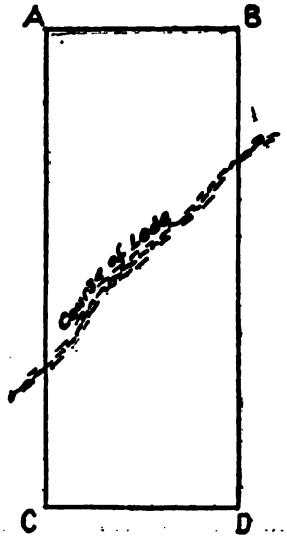
AS TO END LINES.

The right to follow a lode on its dip to an indefinite depth is based upon the hypothesis that the side lines are substantially parallel with the course or strike of the vein and that the end lines are established at right angles to such strike and parallel to each other.

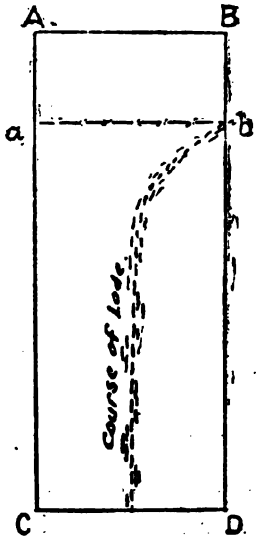
If the end lines are not parallel to each other the location is not void, but the locator has no right to the vein outside of intersecting vertical planes drawn downward through his side and end lines. A location may, however, be amended so as to make the end lines parallel if no adverse right has intervened. The extralateral right to work lodes other than the one specifically located is governed by the same rule.

When a mining claim is located across instead of along the strike or course of a vein, the side lines become end lines for the purpose of determining the right of the claimant to follow his lode on its dip.

To illustrate: In the following diagram the lines A–B and C–D are the end lines of the claim as located. If the lode is found, however, to run in the course indicated on the diagram, the side lines A–C and B–D would be considered as the real end lines.



When the lode leaves one side line only, however, the matter becomes more difficult; but the weight of authority seems to be in favor of the rule that, for the purpose of defining the claimant's right to follow his lode on the dip, a new end line will be drawn through the point where the lode intersects the side line and passes from the claim, parallel with the other end line, as indicated by the end line a–b on the following diagram:



It was said, in substance, in the case of King v. Amy & Silversmith M. Co. (152 U. S. 222), that where a location is so imperfect as not to give the locator all possible rights under the law, the court cannot relocate the claim; the most it can do is to give the claimant such rights as his location warrants.

AS TO PRIOR LOCATIONS ON THE DIP.

The right of the locator of the apex of a vein to work the same on the dip beyond his surface ground may be defeated by the existence of a prior valid location on the dip.

There is no provision of the statute which prohibits locations on the dip. The statute apparently authorizes a location on proper discovery anywhere on the lode, and the courts generally have adopted this view, restricting such locator to the right to work the lode only within the surface boundaries of his claim extended vertically downward.

Section 2323, United States Revised Statutes, expressly recognizes the right to make surface locations of veins discovered in tunnels, which discoveries necessarily would be on the dip of the vein. It would therefore appear that the owner of the apex cannot extract and remove ore from within the boundaries of a prior location on the dip. Whether he would have any right to the vein when it passed beyond such claim has not been authoritatively decided.

CROSS-VEINS.

Under section 2336, United States Revised Statutes, lode claims may be located across each other, the sole requirement being that such location be based upon a proper discovery upon vacant public land. In such a case the junior locator is entitled to all of his vein except that portion thereof at the point of actual vein intersection, which belongs to the senior locator. The junior locator has, however, a right of way for the purpose of extracting and taking away the ore found in his vein.

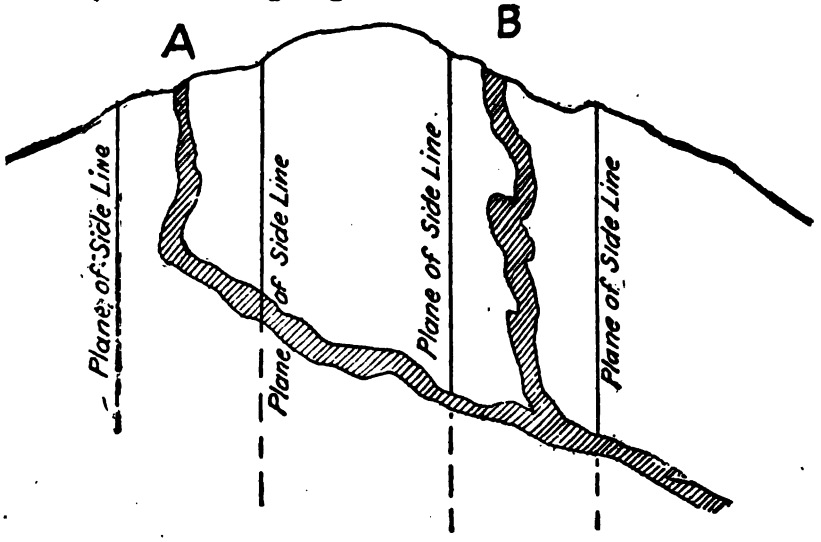
It would appear that the junior locator need not adverse to protect his rights, unless he claims the surface conflict.

Under ordinary conditions the surface belongs to the prior location. The questions as to the rights of the parties to the ore at the point of actual vein intersection and to the surface conflict being solely those of priority, it would seem that either claimant who fails to adverse an application which includes such surface conflict loses his right to both, it being a presumption of law that, when no adverse is asserted, all rights dependent on priority of title are adjudicated in favor of the applicant for patent. Controversies between parties claiming possessory title only, as to the right to work cross-veins, would be determined by the courts on the facts developed as to priority and validity of location.

UNION OF VEINS.

It sometimes happens, however, that veins unite or join on the strike. In such cases there must be surface conflict, and the rules as to surface conflicts govern.

The last sentence of section 2336, United States Revised Statutes, evidently refers to the union of veins on their dip, and it seems to be agreed that the older possessory title will take the vein below the point of union in a case like that shown by the following diagram:



THE LEGAL TITLE.

The preceding paragraphs illustrate the steps necessary to acquire and hold a mining claim by possessory right. The great majority of mining claims are so held, either because they are not considered valuable enough to warrant an attempt to acquire the fee-simple title; because such procedure would invite the assertion of adverse claims, with much vexatious litigation; or because the owner is working his claim on an extensive scale and does not feel the need of the legal title. Some of the most valuable mining claims are held by the uncertain tenure of annual labor. Such title may be sufficient ordinarily, but the legal title evidenced by a patent from the government is much better, as its issue determines forever all controversies relative to surface conflicts, obviates the necessity of any further expenditure for annual labor, and enables the owner to dispose of the mine more readily should he desire to do so. Brief reference to the procedure necessary to secure the legal title of the government by patent will now be made.

PATENTS FOR LODE CLAIMS.

The procedure for acquiring patent for mining claims of this character is governed by section 2325, United States Revised Statutes, and by the mining circular of December 10, 1891, as amended. (See pp. 137 to 320 hereof.)

SURVEY.

The first step necessary is for the claimant to procure an official survey of his claim to be presented to the proper local land office as a part of his application for patent. This requires an application to the Surveyor General of the United States for the surveying district where the land for which patent is desired is situated. Each State or Territory is a surveying district, the Commissioner of the General Land Office being *ex officio* Surveyor General for the district of Arkansas. (See list on p. 172.)

No particular form of application is required, although the form given on page 157 contains all the data necessary. Upon the receipt of such application the Surveyor General will advise the applicant of the amount of money estimated as necessary for the office work in connection with the survey of the claim. The claimant should then deposit such amount with any Assistant United States Treasurer, or designated depository, in favor of the Treasurer of the United States, to be passed to the credit of the fund created by "individual depositors for the survey of the public lands." Of the certificates of deposit, which are issued in triplicate, the depositor should forward the original to the Secretary of the Treasury, *the duplicate to the Surveyor General*, and retain the triplicate for his own protection. Upon the receipt of the duplicate certificate, the Surveyor General will issue an order for the survey to the Deputy Mineral Surveyor selected by the applicant if no objection to such designation appears. (See Form 4–682, p. 158.)

The law, and the regulations thereunder (sec. 2334, U. S. Rev. Stat., and paragraph 98), authorize the applicant for a mineral survey to employ any United

States Deputy Mineral Surveyor he chooses to execute the field work of his survey, and the contract between them is entirely a private matter, relative to which the government will assume no responsibility.

APPOINTMENT OF UNITED STATES DEPUTY MINERAL SURVEYORS.

Inasmuch as this portion of the book is written for the information of all persons who have an interest in the public mineral lands, it is appropriate that it contain a paragraph on the subject indicated in the caption. Under section 2334, United States Revised Statutes, the United States Surveyor General has authority to appoint *as many competent* Deputy Mineral Surveyors in his district as apply for appointment. The person appointed need not necessarily be a resident of the district for which appointment is made, and there are a number of instances where Deputies hold appointments in two or more districts. Applications for appointment should be made to the Surveyor General for the district in which the appointment is sought. This application need not be formal. Upon receipt of an application, the Surveyor General may determine for himself the applicant's qualifications as to character and professional skill in any manner he deems fit, and, should he be satisfied in this regard, the applicant will be required to furnish a bond in the sum of $10,000 for the faithful performance of his official duties. Upon the filing of said bond, if accepted by the Commissioner of the General Land Office, the Deputy will take the usual oath of office, and thereafter will be duly qualified to make contracts for the survey of the mineral lands. Information as to bonds may be had of the various Surveyors General. The appointments of Deputy Mineral Surveyors are not made for any fixed period of time. The tenure under such appointment depends largely upon the manner in which they execute the work intrusted to them.

Under recent legislation (Act of March 2, 1895, 28 Stat. 807), the Surveyor General is required to examine all bonds executed by Deputy Mineral Surveyors every two years as to their sufficiency. Should he deem a bond insufficient because of the death or insolvency of sureties, he may require a new one, and failure to furnish it is cause for the revocation of the Deputy's appointment.

The Surveyors General have authority to suspend or revoke the appointments of their Deputy Mineral Surveyors for cause, subject to the approval of the Commissioner of the General Land Office. From such action by the Surveyor General the Deputy has the right of appeal in the usual manner.

The General Land Office encourages the appointment of as many "competent Deputy Mineral Surveyors as apply for appointment," to the end that "claimants may have a choice of Deputies and be enabled to have their work done on the most advantageous terms."

The money deposited by the claimant for "office work" is expended in the employment of competent persons to examine the returns of the Deputy Mineral Surveyor, make the necessary corrections, prepare the necessary transcripts of field notes and plats, and to pay for the stationery used for such purpose.

The money deposited, if unexpended, may not be repaid, and the certificate of deposit is not assignable, but the depositor, if the survey for which the deposit was made is not executed, may apply the deposit on another survey.

The details relative to the field work on the survey of mining claims may be found in the Instructions to United States Deputy Mineral Surveyors, printed herewith, under the head of Survey, and decisions relative to the various questions raised may be found in the Digest under the same head. It is therefore not deemed necessary to consider this branch of the subject at length, inasmuch as the claimant is not required to exercise any discretion in the matter. It may, however, be stated that should a claimant dictate the manner of making any part of the survey, he is alone responsible if the Deputy's returns are rejected because of conflict with the regulations. Should the notes of survey returned by the Deputy be found correct and in accordance with the regulations, the Surveyor General will prepare four plats and one copy of the original field notes, which are disposed of as follows: One plat and the original field notes are retained in the office of the Surveyor General, two copies of the plat and one copy of the field notes are given the claimant, that he may, in connection with his application for patent, post one plat of the claim and file the other plat and the copy of field notes in the local land office, with the other papers.

The remaining plat is forwarded by the Surveyor General to the local land office to be permanently retained on the files there for reference.

The survey having been properly executed, the claimant is ready to proceed to the next step, which is the

POSTING OF PLAT AND NOTICE OF APPLICATION ON THE CLAIM.

Prior to filing his application for patent the claimant must post on the claim *in a conspicuous place* a copy of the plat furnished him by the Surveyor General, and a notice of said application for patent.

This notice should contain the name of the claim for which application is to be made, the extent of surface ground claimed, the situation thereof by mining district, county and State, a brief but complete description of the claim by metes and bounds taken from the official field notes, and the place of record of the location certificate. This is dated and signed by the claimant.

With the application for patent must be filed a copy of this notice and an affidavit by at least two witnesses as to the fact of such posting. The usual method of making proof in this particular is by an affidavit by the two witnesses, which incorporates a copy of the notice posted. (See Form 1, p. 509.)

APPLICATION FOR PATENT.

Following the posting on the claim, the claimant should next file his application for patent.

The application for patent required by section 2325, United States Revised Statutes, need not follow any particular form, but should contain a brief statement showing the name of the claim, the character of deposit claimed, an alle-

gation of present ownership, and a description of the land. The term "application for patent" is usually applied to the affidavit constituting the formal *application.* In fact, the term includes all papers required to be filed at this time, and which go to show a legal location, title thereunder and compliance with law by the applicants or their grantors. It is usual to make reference in the application (using this word in its restricted sense) to the various other papers filed and which are in reality a part thereof. This "application" must be under oath, and when filed and placed of record operates as a segregation of the land described therein from other appropriation while of record. It may include any number of contiguous locations held in common, whether lode or placer, and, of course, each location should be made a part of the official survey heretofore mentioned. (See Form 2, p. 510.)

TITLE.

The applicant must also at this time file evidence of title. This, according to paragraph 32 of the mining regulations, as amended November 7, 1895, should consist, in case the applicant claims as locator, of a certified copy of the location notice from the mining recorder's office; if he claims as purchaser, the evidence of title should consist of a duly certified copy of the location notice with a complete abstract of title, brought down to date of filing application for patent. The abstracter should certify that no conveyances affecting the title to the claim, other than those set forth in the abstract, are of record.

Abstracts of title may be certified to by the proper recorder, or by any abstracter or abstract company. Accompanying abstracts certified as last mentioned must be proof that the abstracter or abstract company is duly authorized by State or Territorial statute, and that abstracts so certified are receivable as evidence in the local courts in the same manner and to like extent that abstracts certified by the recorder are admitted.

Should it happen that entry is made in the names of parties other than the applicants for patent, or that the name of an applicant is omitted, or that additional parties are joined in entry with the original applicants, it is required that the abstract be brought down to *date of entry*, that patent may issue to those who appear to possess title at that date. The Land Department, however, does not trace title beyond date of entry. The names of co-owners who are shown by the abstract to have title, inadvertently omitted from the application for patent, may be subsequently supplied, but a co-owner whose name is omitted from the application for patent for cause must, under the rulings of the Land Department, protect his right by filing an adverse claim.

The practice of the Land Department, when the abstract of title shows a party possessing an interest who is not joined as entryman, is to require the entryman to show cause why the name should not be inserted in the final certificate of entry. If no showing is made within the time specified, the name is inserted and the entry proceeds to patent.

The abstract must show all the locations covered by the application for patent to be held in common, and the entry will be canceled as to those locations not so owned.

If the abstract shows that at date of application the applicant had no posses-

sory title the entry will be canceled. A defective abstract of title may be explained or supplemented by affidavits.

One basing title upon a relocation need not show title back of such relocation. Should a relinquishment of entered ground be made, a continuation of the abstract to date thereof will be required to show that the one executing the relinquishment had the right to do so.

As a general rule, it may be stated that the abstract of title required in connection with an application for a mining patent must show all the transactions affecting in any manner the possessory title. The Land Department ordinarily does not pay any attention to anything but absolute conveyances, although in a few instances, for the purpose of preventing hardship, it has recognized deeds which were in fact mortgages or contracts for conveyance before application, if full title was acquired before patent. White Extension West Lode, 22 L. D. 677.

Section 2332, United States Revised Statutes, provides that "where such person or association, they or their grantors, have held and worked their claims for a period equal to the time prescribed by the Statute of Limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter in the absence of an adverse claim."

This section of the statute may be invoked in cases where the records of mining claims have been lost or destroyed through lapse of time or by accident, or in cases where there never was made any record of location or of transfers of title.

The applicant desiring to make proof of title under this section should file (1) a duly certified copy of the Statute of Limitations of the State or Territory; (2) his affidavit reciting the facts relative to the origin of his title, the continuance of his possession of the mining ground applied for, the area thereof, the nature and extent of the mining operations of himself and grantors, whether his possession has ever been opposed, when and through what proceedings such opposition, if any, ceased, and any and all other facts within the applicant's knowledge which he desires to submit as bearing upon his right to the land; (3) a certificate under seal of the court having jurisdiction of mining cases within the judicial district embracing the claims, which certificate should show that no suit affecting the title to said mining claim is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the Statute of Limitations of the State or Territory wherein said claim is situate, other than that which has been formally decided in favor of the applicant; and (4) he should support this showing by corroborative testimony in the form of affidavits by disinterested persons familiar with the facts in the case.

CITIZENSHIP.

As further proof in support of his application the claimant must file evidence of citizenship. This evidence, in case of an individual, should consist of his affidavit showing whether he is a native or naturalized citizen, when and

where born and his residence. If he has declared his intention to become a citizen, or has been naturalized, his affidavit must show the date, place and the court before which he declared his intention or from which his certificate of naturalization issued. If he claims citizenship by virtue of his father's naturalization, his affidavit should contain the statement as to date, place and court as in case of his own naturalization. (See Forms 7 and 8, pp. 512 and 513.)

In case of an association unincorporated, the affidavit of citizenship may be made by the agent of the applicants on his own knowledge, or upon information and belief, provided he accompanies the affidavit with a power of attorney from the persons forming such association authorizing him to act for them in the matter of their application for patent. In case such association is not represented by an agent, each individual composing the same is required to execute and file his own affidavit.

A corporation must file a copy of its charter or a certificate of its incorporation, certified by the proper officer in the State where it is operating. For example, a corporation organized under the laws of New York, when filing an application for lands situated in Montana, must furnish a copy of its charter or articles of incorporation certified by the Secretary of State of Montana.

Secondary evidence of citizenship is accepted where it is shown to be impossible to furnish the affidavits of the parties themselves.

PUBLICATION.

Thereupon the Register of the land office is required to publish a notice of such application for patent in a newspaper published *nearest* to such claim for a period of sixty days. This notice must be substantially the same as the notice posted on the claim. The sixty days period of publication must actually cover sixty-one days in a daily, or ten consecutive insertions in a weekly newspaper. The newspaper must be one of general circulation, and if two such are published within about the same distance, the Register may exercise his discretion as to the one to be designated. (See Form 4, p. 511.)

It is usually the practice for the Register to designate the newspaper selected by the applicant, provided such newspaper is within the conditions prescribed by the statute and the regulations thereunder.

The expense of publication must be paid by the claimant, who, with his application, must furnish the agreement of the publisher to hold the applicant alone responsible for the charges of publication. (See Form 3, p. 510.)

The cost of publication must not exceed the rates established by State and Territorial laws for the publication of legal notices.

POSTING IN LAND OFFICE.

At the same time the Register must post a similar notice in the local land office, and the three notices — the one posted on the claim, the one published, and the one posted on the bulletin in the local land office — must cover the same period of time, *i. e.*, the sixty days period of publication. A material

defect in one or the other of these notices will necessitate republication and posting. Paragraph 29 of the Regulations, p. 172, specifies what the notice posted on the claim must contain, and it was held by the Land Department recently that a failure to note in the notices the names of adjoining claims, or the fact that none existed, was fatal. As to the requirements for published and posted notices, see, also, paragraphs 35 and 36 of the Regulations, p. 218.

FILING FEE.

A filing fee of $10 must be paid to the local land officers for each application for patent.

FIVE HUNDRED DOLLARS EXPENDITURE.

Either at the time of filing his application for patent, or at any time within the sixty days period of publication, the claimant must file the certificate of the United States Surveyor General that not less than $500 has been expended in improvements upon the claim by the applicant or his grantors. It is the usual method for the United States Surveyor General to incorporate this certificate in the official field notes heretofore mentioned, and to indorse the same upon the plat of survey, the certificate being based upon the report as to improvements returned by the Deputy Mineral Surveyor. Should it happen, however, that at the time when the survey was made the requisite expenditure had not been made, a subsequent report by the Deputy may be made and a certificate issued based thereon. The Land Department, however, will not accept a certificate on improvements made after the expiration of the sixty days period of publication. (For specimen certificate see Form, p. 168.)

"Work may be done or improvements made upon one or more locations of a group of claims, contiguous and held in common, for the development of the entire group, and when so done or made to the required amount may be considered as a compliance with the law requiring an expenditure of $500."

When any one or more of the locations embraced in an application contain less than the full amount of development work, it must clearly appear that the expenditure made elsewhere on the claim develops or tends to the development of the claim as a whole, otherwise the application will be canceled as to the locations which do not show the full expenditure of $500.

Expenditures which tend to facilitate the extraction of the metals the claim may contain are sufficient under the law, but such expenditure must have been made by the applicant or his grantors, and the return of the Deputy Mineral Surveyor must so state.

Should the discovery and improvements be excluded from the entry of a mining claim, the entry will be canceled unless it be shown that mineral has been discovered and the requisite expenditure made upon that portion of the ground retained.

The papers heretofore mentioned are filed with the Register at the same time, and cover what may be called the Application for Patent. If considered sufficient by the officials they are given a number, the date of filing noted thereon and the records so noted. This action has the effect of segregating

the land to the extent of preventing other appropriation thereof while this application is of record. Should the local land officers deem the application insufficient they will reject it, and the claimant has the alternative of correcting the papers to agree with the requirements of the local land officers, or of appeal from their rejection to the Commissioner of the General Land Office, and if the decision on the issue raised is adverse to the applicant a further appeal may carry the matter to the Secretary of the Interior, whose decision, in so far as the action of the Executive branch of the government is concerned, is final. A further reference will be made to this matter under the title of *Protest and Hearing.*

Should it happen that a mineral application be presented for lands which the records of the local land office show to be otherwise appropriated, the application will be rejected. The applicant, however, may show the prior appropriation to be invalid because the land is not of the character for which it has been appropriated.

If, as not infrequently happens, a claim which has been made the subject of an application for patent has since been abandoned and relocated, the relocator before applying for patent must secure the cancellation or annulment of the first application. The procedure in such a case is very simple.

A petition should be filed in the proper local land office, under oath and corroborated, setting forth in clear terms the filing of said application, the fact that for a certain year or longer time the required annual labor was not performed upon the claim applied for; that by reason of such fact the petitioner had relocated the ground; that he is desirous of obtaining a patent for his claim, and concluding with the prayer that a hearing be ordered to enable the petitioner opportunity of proving his allegations.

The hearing will be ordered in due course, and the relocator must be careful that legal service of the summons is made upon the applicant. Should it be decided upon the testimony submitted that the allegations of the relocator have been proven, the local land officers will transmit the record to the General Land Office with the recommendation that the application be canceled. Should all be found regular by that office, the application will be canceled, thus clearing the record for the reception of the second application.

FINAL PROOFS.

Upon the expiration of the period of publication the claimant may file (1) proof of continuous posting, (2) proof of publication, (3) proof of sums paid, and (4) application to purchase; and if all the evidence submitted appears to be regular, and no adverse claim or protest has been filed, final entry will be allowed upon the payment to the Receiver for the land at the rate of $5 per acre and fraction of an acre.

PROOF OF CONTINUOUS POSTING.

This consists of an affidavit by the applicant, or his duly authorized agent, to the effect that the plat and notice posted on the claim (see Form 5, p. 511) remained continuously and conspicuously posted thereon from the —— day

of ——, 189—, until and including the —— day of ——, 189—, and covering the sixty days period during which notice was published in the newspaper.

Particular care should be taken that the proper dates of posting are given in this affidavit. It will not do for the affidavit to state generally "that said plat and notice remained posted continuously during the sixty days period of publication." The Land Department insists that the specific dates be given in all these affidavits. It is noticed that in a large number of cases submitted there is great carelessness in this particular, and in consequence the claimants are subjected to delay which might well be avoided. (See Form 6, p. 512.)

PROOF OF SUMS PAID.

The claimant at the time of making final proof and payment should also submit an affidavit showing the moneys paid out in the prosecution of his claim. The statute requires this affidavit in order that the Land Department may see that no exorbitant charges have been made by parties within its jurisdiction. The statement should show the amount deposited for office work in the Surveyor General's office; the amount paid the Deputy Mineral Surveyor for field work; the fee for filing application for patent; the amount paid for publication; and the amount paid the Receiver for the land. The Land Department, by section 2334, United States Revised Statutes, has authority to regulate these charges with the exception of the third and fifth, which are fixed by statute, and will inquire into cases where the charges appear to be excessive in these particulars. (See Form 9, p. 513.)

PROOF OF PUBLICATION.

This evidence should consist of the affidavit of the publisher to the effect that a notice (a copy of which is attached to said affidavit) was published in his paper from the —— day of ——, 189—, to and including the —— day of ——, 189—. (See Form 4, p. 511.)

PURCHASE AND ENTRY.

The claimant should also file an application to purchase (see Form 14, p. 516), and should therein specifically describe the land it is desired to enter. This may be shown in the most satisfactory way by making specific exclusions from the official survey taken as the basis of application for patent, of all portions of the claim excepted from entry. On this application to purchase the Register will make the proper indorsement, and it is then presented to the Receiver and a tender of the purchase-money made. The Receiver will then issue his receipt (see Form 15, p. 517), and upon the presentation thereof to the Register final certificate of entry will issue (see Form 16, p. 517), and the transaction is complete. The Receiver's receipt is issued in duplicate, the duplicate being given to the entryman for his protection and as an evidence of title, and must be surrendered in order to secure the patent when issued. If said duplicate receipt has been lost, however, an affidavit of such loss is accepted by the Land Department in lieu of the surrender thereof. (See Form 23, p. 525.)

PROOF OF POSTING IN OFFICE.

At this time the Register should also prepare and file with the papers his certificate of posting notice in the local land office for sixty days, which period must be concurrent with the period of publication. (See Form 13, p. 516.)

PATENT.

In the ordinary course of business the papers are transmitted to the General Land Office. Here they are examined critically, and if no irregularities are discovered in the proofs made, the entry, as it is then called, is approved, and the fee-simple deed of the government, called a "Patent," is prepared and delivered.

Title by patent is title of record, and delivery is not essential to the validity thereof. Patent having been duly signed, sealed and recorded, the matter has passed beyond the jurisdiction of the Land Department, and the land is to all intents and purposes private property, the same as other real estate. A patent of the United States cannot be attacked collaterally, and can only be set aside by a direct proceeding instituted for that purpose in the courts. (See Forms 17 to 22, pp. 518 to 524.)

ADVERSE CLAIM.

It is provided by section 2325, United States Revised Statutes, that the applicant shall be entitled to a patent upon the payment of the purchase-money, if the proceedings have been regular and no adverse claim has been filed during the period of publication.

Section 2326, United States Revised Statutes, prescribes the method of asserting an adverse claim, and this section of the statute must be invoked by any one claiming an interest in the ground applied for, adverse to the applicant.

The adverse claim, which must be under oath, must be filed with the Register and Receiver of the land district where the application for patent was filed. It may be verified by the adverse claimant, or by any duly authorized agent or attorney in fact of the adverse claimant familiar with the facts stated. Such agent or attorney, however, must state the fact of agency under oath and file proof thereof. If the adverse claimant is at the time residing beyond the limits of the land district where the land is situated, he may make oath to his adverse claim before the clerk of any court of record of the United States or of the State or Territory where he may then be residing or before any notary public of such State or Territory. An agent or attorney in fact must make the oath within the land district where the claim is situated.

The adverse claim should show the nature and extent of the alleged conflict of ownership, and in these particulars the adverse claimant should show title in practically the same manner as the applicant was required to show it in support of his application for patent, viz., by a certified copy of his location certificate if he claims as locator, and in addition by a properly certified abstract of title if he claims as purchaser. In connection therewith the adverse claimant must file a plat showing his whole claim, the relative position thereof

with regard to the claim adversed, the extent of the conflict, and the position of all shafts, tunnels or other mining improvements. This plat must be executed by a United States Deputy Mineral Surveyor, who must also indorse thereon a certificate showing the value of any and all improvements placed upon the claim by the adverse claimant or his grantors.

This adverse claim must be submitted within the sixty days period of publication, and, when so submitted, the Register, upon the receipt of the filing fee of $10, will indorse thereon the date of filing, properly note his records, and advise the parties thereof, calling attention to the fact that the adverse claimant must, within thirty days from date of such filing, begin suit on his adverse claim in a court of competent jurisdiction, and that upon his failure to do so the adverse claim will be considered waived, and the application for patent allowed to proceed.

The filing of an adverse claim has the effect to stay proceedings in the matter of the application for patent until evidence is filed showing that no suit was commenced within the period of time allowed, or, if commenced, that the same has been dismissed or finally decided. In computing the time during which an adverse claim may be filed, it is the rule to exclude the first day of publication, the time expiring on the sixtieth day thereafter. For example, if publication began July 5, 1896, and ended September 8, 1896, the last day on which an adverse might be filed was September 3, 1896.

A party may for himself and co-owners make and verify an adverse claim, and when the name of a co-owner is omitted from the application for patent, he must, under the decisions of the Land Department, protect his rights by filing an adverse claim. The Supreme Court of the United States, however, in the case of Turner v. Sawyer, 150 U. S. 578, has decided that a co-owner whose name is omitted from the application for patent need not proceed under section 2326, United States Revised Statutes, said section having no application to such a case.

Should the sixtieth day of publication fall upon Sunday or upon a legal holiday, the adverse may be filed on the next business day.

If for any reason the local land officers reject the adverse claim, the party filing the same has the right of appeal from such action.

Attention, however, is called to the fact that the Land Department has recently ruled that, even though his claim is rejected, the adverse claimant must nevertheless begin his suit within thirty days from the date the same was offered, there being no provision of the statute which authorizes him to wait to begin suit until his appeal is decided by the Land Department. (See Form 12, p. 514.) In computing the time within which suit may be brought, the day on which the adverse claim is filed is excluded, the last day for beginning suit being the thirtieth day after the day of filing the adverse.

This suit should be brought in the local court having jurisdiction to try title to real estate, in the county wherein the mining claim is situated, or in cases where the value of the property in dispute reaches the jurisdictional limit of $2,000, and where one of the parties to the controversy is a non-resident of the State or Territory, the suit may be brought in a United States Circuit Court.

Whatever the form of action prescribed by the State Code, each party must

allege title, and if neither party establishes title "the jury shall so find." (See Act of March 3, 1881, p. 284.) No forms of pleadings are given, inasmuch as the practice in the various State and Territorial courts differ, and on bringing action it becomes necessary, of course, for the claimant to secure the services of an attorney familiar with this part of the procedure.

The statute requires that the adverse claimant, upon commencing suit, shall prosecute the same with reasonable diligence to final judgment, and that failure to do so shall be a waiver of his adverse claim.

The Land Department, however, is not authorized to determine whether the parties have exercised "reasonable diligence," for by the terms of the section the institution of suit ousts the executive branch of the government of jurisdiction, which ouster is effectual until the controversy has been finally determined. This clause of the statute apparently is a direction to the courts, and should be invoked therein by a party feeling aggrieved by what he deems unnecessary and vexatious delay.

The Land Department, after adverse filed, re-assumes jurisdiction upon being advised by the proper evidence that no suit has been commenced or that the controversy in the courts has terminated. This proof should consist, where no suit has been commenced within the statutory period, of a certificate to that effect by the clerk of the State court having jurisdiction, and by the clerk of the Circuit Court of the United States for the district in which the claim is situated; in case the suit has been dismissed, a certificate by the clerk of the court reciting the fact, or a certified copy of the order of dismissal, should be filed; and where final judgment has been rendered in favor of the applicant, he should file a certified copy of such judgment, and his application may then proceed in its regular order.

During the suspension of proceedings in the matter of a mineral application the publishing and posting of notice may continue for the full period prescribed, and the claimant may at any time file proof thereof. No further steps, however, may be taken during the pendency of the controversy.

An adverse claim may be waived by the adverse claimant, or the applicant may relinquish the portion of his claim involved in litigation and proceed with his application as to the residue thereof. A waiver can only become effectual by filing therewith the proof as to termination of suit, heretofore noted; and should the suit result in a judgment changing the boundaries or extent of the applicant's claim, an amended survey of the claim is generally necessary to define each party's rights.

Either party may enter and receive patent for the land awarded him by judgment by filing in the local land office a certified copy of the judgment roll, a certificate of the Surveyor General showing $500 improvements and the plat and field notes required in other cases.

In case, however, judgment is in favor of the applicant for the whole area involved and he wishes to enter his whole claim, he need only file the certified copy of the judgment, the plat and field notes originally filed with the certificate as to improvements made a part thereof being deemed sufficient, his claim being considered as a whole.

PLACER CLAIMS.

In most particulars applications for patent for placer claims are similar to applications for lode claims.

If the placer has been located and is claimed by legal subdivisions, no survey is necessary, and the application, instead of a reference to official field notes and plat of survey, should contain a description of the land applied for by section, township and range.

If the location is upon unsurveyed lands, or upon surveyed lands and does not conform to the description thereof, an official survey by metes and bounds is required. Neither is there any difference in the proof required as to title, and the details relative to posting and publication with proof thereof are identical with those required as to lode claims.

The Surveyor General having no duty to perform relative to placers taken by legal subdivisions, the proof as to $500 expenditure may consist of the affidavit of the applicant, supported by the affidavit of disinterested parties. This evidence must show the location and character of the improvements claimed, and that they were made by the applicant or his grantors.

Although no location of a placer claim may exceed twenty acres in area for one individual, or one hundred and sixty acres for an association of individuals, a claimant may include any number of contiguous locations he has acquired by purchase or location, in his application for patent. He is required to submit proof showing the discovery of mineral on every twenty acres embraced in his application, which proof may consist of the affidavit of the applicant corroborated by the affidavits of disinterested witnesses, specifying in detail the character of the discoveries and the location thereof.

Veins or lodes frequently are known to exist within the boundaries of placer claims. In such case if the placer claimant is in possession of the vein or lode so included, he may embrace the same in his application, which, with the posted and published notices, must in detail refer to and describe such vein or lode. The vein or lode with surface ground to the extent of twenty-five feet on each side thereof must be shown by an official survey, which must be filed as part of the application for patent. The application for patent may be modified by adding a clause practically as follows: * * * "and for the Gold Lode mining claim embraced therein, consisting of 1500 linear feet of such Gold lode, bearing gold, together with 25 feet of surface ground on each side thereof, as shown by the official plat and field notes of survey No. ——, attached to and made a part hereof. Said Gold lode was discovered * * * as will more fully appear by reference to the abstract of title hereinbefore mentioned as part of this application for patent."

If the placer is claimed by legal subdivisions it may be so described in the application with the additional claim for the vein or lode above noted; if the placer is taken by metes and bounds, both placer and lode of course will be embraced in one survey, and the application may state that it is "for the * * * placer embracing the Gold lode, as will more fully appear by a reference to the official plat and field notes."

If everything proceeds regularly, and no adverse interests are asserted, entry

may be made upon payment of $2.50 per acre for the area of the placer ground and $5 per acre for the area shown by the survey of the lode claim.

The purchase price of placer land is $2.50 per acre; of lode claims and mill sites, $5 per acre. If a number of contiguous locations are embraced in one claim, the areas of the separate locations are added together, and the fraction of an acre, if any, is charged for as an acre.

If the applicant for a placer patent fails to include therein any known lodes which may be within the exterior boundaries of his claim, the statute (sec. 2333, U. S. Rev. Stat.) provides that such failure "shall be construed as a conclusive declaration that the claimant of a placer claim has no right of possession of the vein or lode claim." It is further provided that a patent issued on a placer claim shall be held to convey all veins or lodes not known to exist at date of the placer application.

The application for a placer patent must be accompanied by proof in the form of an affidavit by at least two witnesses that there is no lode or vein known to exist within the placer claim. (See Form 10, p. 513.)

All patents issued on placer claims contain a clause excluding therefrom all veins or lodes known to exist at date of placer application and not claimed by the applicant.

The claimant of a known lode may secure patent to his claim by presenting in the usual manner his application for patent. Such application will be rejected because of conflict with a patented claim. He may then file corroborated affidavits alleging the known existence of the vein or lode at date of placer application, that it was for that reason excepted from the placer patent, and that the mine was and is a valuable one capable of being worked profitably.

Upon such evidence being filed the Land Department will, if the showing made is deemed sufficient, order a hearing to determine the issues raised, after notice to the claimants under the placer patent, and if decided in the affirmative a patent will issue for the lode claim without reference to the outstanding placer patent. (South Star Lode, 20 L. D. 204.) This decision reversed the former practice, which declared that, even if the known existence of the vein or lode was conclusively shown, no patent could issue thereon until the cancellation of the outstanding patent to the extent of the conflict, in a direct proceeding brought in the courts for that purpose by the United States.

The rule laid down in the South Star case has been applied by the General Land Office in the case of lode mining claims conflicting with patented town sites, when it is alleged that such vein or lode was known to exist at date of town site application, it being held that the town site law, sections 2386 and 2392, United States Revised Statutes, contains an exception of veins or lodes similar to that contained in section 2333, United States Revised Statutes.

MILL SITE APPLICATION.

Mill sites, under section 2337, United States Revised Statutes, may be applied for and patented either in connection with a vein or lode, or separately.

In the first class of cases the application for patent and the proof filed in

support thereof should in every essential particular refer to the mill site adjunct, the claim being applied for as a whole.

It has recently been decided by the Land Department that a mill site claimed under the first clause of said section may be applied for and patented alone, provided it be shown that it is owned and used or occupied in connection with a lode for mining purposes. The view held prior to this decision was that a mill site claimed in connection with a vein or lode claim could only be patented under an application including both.

An application for a mill site may be filed by a claimant not owning a lode claim in connection therewith, under the second clause of section 2337, United States Revised Statutes. This portion of the statute contemplated the necessity of reduction works in mining communities to be erected and operated by parties not directly interested in mines, it being intended thereby to enable such persons to acquire suitable sites.

A mill site claim must not exceed in area five acres, and must be paid for at the rate of five dollars per acre, the same as lode claims.

Inasmuch as there are no legal subdivisions of this small area, there must be an official survey of the mill site, full directions for which may be found in the Instructions for Surveys bound herewith, page 149.

A copy of the notice must be posted on the mill site as well as on the lode claim, and the notices posted and published must specify both lode and mill site and contain a description of each.

The mill site must be non-contiguous to the lode, be non-mineral, and be used or occupied as prescribed by the statute. It is the practice to allow applications where the mill site claim abuts on the end of the lode claim, provided it be clearly shown that no part of the vein itself is within the mill site, the presumption being, however, to the contrary.

The proof as to the non-mineral character of the mill site may, when the matter is unquestioned, consist of the affidavit of two witnesses familiar with the facts. (See Form 11, p. 514.)

The official field notes of survey should contain a statement as to the improvements which indicate use and occupancy, and this should be supplemented by affidavit of the claimant or his agent.

AFFIDAVITS.

Section 2335, United States Revised Statutes, prescribes that all affidavits required to be made under the mining laws may be sworn to before any officer authorized to administer oaths within the land district where the claim for which patent is sought is situated, and no provision is made in the Revised Statutes for verification by any one but the claimant himself. These requirements were modified by the acts of January 22, 1880, and April 26, 1882. The first authorizes a non-resident applicant for patent, or an applicant temporarily absent from the land district, to take the steps necessary to secure patent through an agent or attorney in fact duly appointed.

A co-owner may make application for himself and his co-owners, and a corporation may act through its agent. The latter act permits the adverse claim-

ant, as has been noted, to authorize an agent or attorney in fact to verify his adverse claim, or he may, if residing or at the time beyond the land district, make the oath to his adverse claim before the clerk of any court of record of the United States or the State or Territory where he may be, or before any notary public of such State or Territory. This act also authorizes any mining applicant, if residing beyond the land district, to make his affidavit of citizenship before the clerk of any court of record, or before any notary public of such State or Territory. With the exception of the affidavits mentioned by the act of April 26, 1882, all proofs in mining cases which require verification must be executed within the land district where the premises involved in the proceedings are situated.

PROTEST AND HEARING.

The preceding paragraphs contemplate that all the proceedings in the various steps to acquire title have been regular and in compliance with law. This may not, however, be the case, and opportunity is given by the law and the regulations, to those asserting the contrary, to present the matter in proper form for determination by the Land Department. The concluding clause of section 2325, United States Revised Statutes, states, "and thereafter no objection from third parties to the issuance of patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

A party claiming an interest adverse to the applicant must protect his claim in accordance with the method prescribed by section 2326, United States Revised Statutes. In the event of his failure to do so he cannot set up his claim in the form of a protest, and have the same adjudicated by the Land Department. A protest, to receive consideration, must allege a failure to comply with law in some material particular by the applicant for patent, which failure if proven would be sufficient to necessitate the cancellation of the application or entry. It must be under oath, and when directed against a claim on which final entry has been made must be corroborated by the affidavit of two witnesses.

Protests may be filed at any time prior to the issuance of patent, and should be filed in the local land office as a rule. If directed against an application for patent, the local land officers have jurisdiction to pass upon the same; if against an entry, the protest will be forwarded by the local land officers to the Commissioner of the General Land Office, who will take appropriate action thereon.

If a protest is deemed sufficient and raises an issue, a "hearing" will be ordered at which both parties may submit testimony; if considered as not possessing sufficient merit to justify further investigation it will be dismissed.

Either party has the right of appeal to the Commissioner of the General Land Office from the adverse action of the Register and Receiver.

The protestant has no right of appeal from the decision of the Commissioner to the Secretary of the Interior unless he alleges an interest in the land in controversy and that his rights were injuriously affected by the failure of the applicant to comply with the conditions prescribed by the law, the theory being that the protestant who alleges no interest is a mere *amicus curiæ*, and that

as such an appeal by him would be equivalent to an appeal by the government from its own action.

The proceedings before the Land Department in such cases are governed by printed regulations entitled "The Rules of Practice."

The character of the land may be brought in issue by a protest filed against any application for patent pending under either the mineral or agricultural land laws. The "Rules of Practice" are modified for such cases by paragraphs 108 to 118 inclusive of the Mining Regulations, printed on page 337.

Frequent complaint is made that valuable mineral lands are being fraudulently taken under the agricultural land laws, by individuals, or by corporations and by States under the land grant acts, or that agricultural lands are being wrongfully appropriated under the mineral land laws. The Land Department has prescribed regulations which, if invoked by individuals desirous of protecting the public domain from spoliation, are sufficient to defeat any improper or unlawful claim.

Citizens should be mindful of the fact that the government is powerless to make a specific investigation as to the character of each tract of public land. The public domain is so vast that reliance must, in the great majority of cases, be placed upon the proofs submitted in support of each specific claim. If the proofs are regular, and no showing to the contrary is made, patent will issue based upon the record made. No application can go to patent without, under the statutes, great publicity being given to the proceedings.

The residents of a community should see that no patent is granted for lands therein which are not clearly of the character contemplated by the law under which the appropriation thereof is made. Concerted action in this direction would do much to preserve the valuable mineral lands of the United States for the miner, and would encourage the settlement and development as homes of such lands as are clearly agricultural.

PART III.

FORMS.

FORMS.

Forms for proofs in mineral cases are not furnished by the General Land Office. Paragraph 119 of the Mining Regulations.

No. 1. Proof of Posting of Notice and Plat on Claim.
2. Application for Patent.
3. Agreement of Publisher.
4. Affidavit of Publisher.
5. Notice to be Published and Posted.
6. Proof of Continuous Posting of Notice and Plat on Claim.
7. Affidavit of Citizenship (Native.)
8. Affidavit of Citizenship (Naturalized.)
9. Sworn Statement of Fees and Charges.
10. Proof of no Known Veins in Placer.
11. Proof of Non-mineral Character of a Mill Site.
12. Adverse Claim.
13. Register's Certificate of Posting in Office.
14. Application to Purchase.
15. Receiver's Receipt.
16. Register's Final Certificate of Entry.
17. Patent for Lode Claim.
18. Patent for Placer with Included Lode.
19. Patent for Placer taken by Mineral Survey.
20. Patent for Placer taken by Legal Subdivisions.
21. Patent for Mill Site.
22. Patent for Coal Lands.
23. Affidavit of Loss of Duplicate Receipt.

No. 1.

Proof of Posting of Notice and Plat upon the Blank Lode Mining Claim.

John Smith and Henry White, being first duly sworn according to law, each for himself and not one for the other, deposes and says that on the tenth day of April, A. D. 1896, he was present on the Blank Lode mining claim when there was posted in a conspicuous place upon said claim, to wit, on the discovery shaft house, a plat of mineral survey No. 7777, approved by the United States Surveyor General of the State of Colorado, together with a notice of the application of John Smith for a United States patent for said mining claim, and that a true copy of the notice so posted is hereto attached and made a part hereof.

[*Two witnesses sign here.*]

JOHN SMITH,
HENRY WHITE.

STATE OF COLORADO, }
County of El Paso. } ss.

Subscribed and sworn to before me this tenth day of April, A. D. 1896.

[*Seal.*]

RICHARD JONES,
Notary Public.

NOTE.—Affix copy of posted notice to this affidavit as a part thereof.

No. 2.

Application for Patent for the Blank Lode Mining Claim.

BEFORE THE UNITED STATES LAND OFFICE.

AT

PUEBLO, COLORADO.

John Smith, being first duly sworn according to law, deposes and says: [*If attorney for applicant, so state.*]

That by virtue of a compliance with the terms of Chapter six of Title thirty-two, United States Revised Statutes, and acts supplemental thereto or amendatory thereof, and with the laws of the State of Colorado, and with the miners' customs and regulations of the Cripple Creek Mining District, he is the owner of and in the undisputed possession of the Blank Lode mining claim, bearing gold and silver,* the same being † mineral survey No. 7777, situate in the Cripple Creek Mining District, county of El Paso, State of Colorado, as is more fully shown by the abstract of title, plat and field notes of survey and other papers filed herewith and made a part hereof.

That by such compliance with the laws, customs and regulations, he is entitled to a patent from the United States for the said Blank Lode mining claim and hereby makes application for such patent.

JOHN SMITH.

STATE OF COLORADO, }
County of El Paso. } ss.

Subscribed and sworn to before me this eleventh day of April, A. D. 1896.

[*Seal*] RICHARD JONES,
Notary Public.

* If a mill site is applied for in connection with a lode claim, insert "and the —— mill site, a tract of non-mineral land, used and occupied for mining and milling purposes in connection with said —— lode claim."

† If the claim is a placer, taken by legal subdivisions, insert description of the land.

No. 3.

Agreement of Publisher.

STATE OF COLORADO, }
County of ——. } ss.

I, the undersigned, publisher of the Cripple Creek Herald, do hereby agree to publish a notice of the application of John Smith for a United States patent for the Blank Lode mining claim, situate in the Pueblo, Colorado, Land District, as such notice is required by law to be published, and to hold the said John Smith alone responsible for the charges and expense of such publication, and do expressly agree to make no charge or claim against the government of the United States, its officers or agents, on account of such publication.

ROBERT GREEN.

Signed this eleventh day of April, A. D. 1896, in the presence of

SAMUEL JOHNSON.

No. 4.

Affidavit of Publisher.

Robert Green, being first duly sworn according to law, deposes and says that he is the publisher of the Cripple Creek Herald, a newspaper of general circulation, published in Cripple Creek, State of Colorado; that a notice, of which the annexed notice is a true copy, of the application of John Smith for a United States patent for the Blank Lode mining claim, was published in every regular weekly issue of said newspaper and not in a supplement, from the sixteenth day of April, A. D. 1896, to and including the eighteenth day of June, A. D. 1896, said notice being published during ten consecutive weeks.

ROBERT GREEN.

STATE OF COLORADO, }
County of El Paso. } ss.

Subscribed and sworn to before me this nineteenth day of June, A. D. 1896.

[*Seal.*] RICHARD JONES,
Notary Public.

NOTE.—Affix printed copy of published notice to this affidavit as a part thereof.

No. 5.

Notice to be Published.

MINERAL APPLICATION No. ——.

UNITED STATES LAND OFFICE, PUEBLO, COLORADO,
April 11, 1896.

Notice is hereby given that John Smith, whose postoffice address is Cripple Creek, Colorado, has made application for a United States patent for the Blank Lode mining claim, mineral survey No. 7777, situate in the Cripple Creek Mining District, county of El Paso, State of Colorado, covering 395 feet of the Blank lode in a northerly direction from the discovery shaft, and 234.88 feet in a southerly direction therefrom, and lying in the W. ½ of Sec. 32, T. 15 S., R. 69 W., and more particularly described as follows:

Beginning at Cor. No. 1, a pine post in mound of rocks, marked 1–7777, whence the W. ¼ Cor. of Sec. 32, T. 15 S., R. 69 W., 6th P. M., bears N. 87° 13′ W., 2043.33 feet, and running thence,

N. 16° 42′ E., 629.88 feet to Cor. No. 2. Thence,

S. 74° 47′ E., 285.1 feet to Cor. 3. Thence,

S. 16° 42′ W., 629.88 feet to Cor. No. 4. Thence,

N. 74° 47′ W., 285.1 feet to Cor. No. 1, place of beginning, containing, exclusive of conflict with mineral survey No. 7000, Kohnyo lode claim, 4.07 acres.

The notice of location of this claim is recorded in the office of the Recorder of El Paso county, at page 123 of Book L. of Locations.

Neighboring or adjoining claims are, the Kohnyo lode on the north, claimant unknown, and the Mt. Rosa placer on the south, Jacob Green, claimant.

JOHN WILKINS,
Register.

Notice to be Posted upon Claim (with Plat).

Same as above, omitting Land Office caption, and to be signed by claimant instead of by the Register.

No. 6.

Proof of Continuous Posting of Notice and Plat upon the Blank Lode Mining Claim.

John Smith, being first duly sworn according to law, deposes and says that he is the applicant for patent for the Blank Lode mining claim, mineral survey No. 7777, situate in the Cripple Creek Mining District, county of El Paso, and State of Colorado.

That a notice of his application for a United States patent for said mining claim, together with a plat of the official survey of said claim, approved by the United States Surveyor General of Colorado, remained posted in a conspicuous place upon said Blank Lode mining claim from the tenth day of April, A. D. 1896, to and including the first day of July, A. D. 1896.

JOHN SMITH.

STATE OF COLORADO, }
County of El Paso. } ss.

Subscribed and sworn to before me this second day of July, A. D. 1896.

[*Seal.*]

RICHARD JONES,
Notary Public.

No. 7.

Affidavit of Citizenship (Native).

John Smith, being first duly sworn according to law, deposes and says that he is the identical John Smith who is an applicant for patent for the Blank Lode mining claim, mineral survey No. 7777, in the Pueblo, Colorado, Land District; that he is a native-born citizen of the United States, born in Detroit, Michigan, in the year 1860, and is now a resident of Cripple Creek, Colorado.

JOHN SMITH.

STATE OF COLORADO, }
County of El Paso. } ss.

Subscribed and sworn to before me this eleventh day of April, A. D. 1896.

[*Seal.*]

RICHARD JONES,
Notary Public.

No. 8.

Affidavit of Citizenship (Naturalized).

John Smith, being first duly sworn according to law, deposes and says that he is the identical John Smith who is an applicant for patent for the Blank Lode mining claim, mineral survey No. 7777, in the Pueblo, Colorado, Land District; that he is a naturalized citizen of the United States, born in London, England, in the year 1860, and was naturalized before the District Court for El Paso county, State of Colorado, on the thirtieth day of October, A. D. 1890, and is now a resident of Cripple Creek, Colorado.

JOHN SMITH.

STATE OF COLORADO, } ss.
County of El Paso. }

Subscribed and sworn to before me this eleventh day of April, A. D. 1896.

[*Seal.*] RICHARD JONES,
Notary Public.

No. 9.

Sworn Statement of Fees and Charges.

John Smith, being first duly sworn according to law, deposes and says that he is the applicant for patent for the Blank Lode mining claim, mineral survey No. 7777, in the Pueblo, Colorado, Land District.

That in the prosecution of said application he has paid out in the manner below indicated the following named sums and no more, to wit:

To United States Deputy Mineral Surveyor	$75.00
To credit of United States Surveyor General for office work	35.00
Fee for filing application for patent	10.00
For publication of notice of application for patent	20.00
Purchase price of land entered	25.00

JOHN SMITH.

STATE OF COLORADO, } ss.
County of El Paso. }

Subscribed and sworn to before me this first day of September, A. D. 1896.

[*Seal.*] RICHARD JONES,
Notary Public.

No. 10.

Proof of no Known Veins in a Placer Claim.

John Smith and Henry White, being first duly sworn according to law, each for himself and not one for the other, deposes and says that he is well acquainted with the Blank Lode placer mining claim, the same being ——,* having been frequently over and upon the same; that his knowledge of the character of the land embraced in said claim is such as to enable him to testify understandingly relative thereto; that there is not, to the best of his knowl-

edge and belief, within the limits of said placer claim any vein, lode or ledge of mineral-bearing rock in place.

[*Two witnesses sign here.*]

JOHN SMITH,
HENRY WHITE.

STATE OF COLORADO, } ss.
County of ——. }

Subscribed and sworn to before me this tenth day of April, A. D. 1896.

RICHARD JONES,
Notary Public.

*NOTE.—If the placer is taken by legal subdivisions, insert description; otherwise give the official survey number.

No. 11.

Proof of the Non-mineral Character of a Mill Site.

John Smith and Henry White, being first duly sworn according to law, each for himself and not one for the other, deposes and says that he is well acquainted with that certain tract or parcel of land known as the Blank mill site, the same being mineral survey No. 7777 B, having been frequently over and upon the same; that his knowledge of the character of said land is such as to enable him to testify understandingly relative thereto; that there is not, to the best of his knowledge and belief, within said mill site claim any vein, lode or ledge of mineral-bearing rock in place, nor is there within said claim any valuable mineral deposit; but the land covered by said mill site claim is essentially non-mineral in character.

[*Two witnesses sign here.*]

JOHN SMITH,
HENRY WHITE.

STATE OF COLORADO, } ss.
County of ——. }

Subscribed and sworn to before me this tenth day of April, A. D. 1896.

RICHARD JONES,
Notary Public.

No. 12.

Adverse Claim and Protest.

BEFORE THE UNITED STATES LAND OFFICE
AT
PUEBLO, COLORADO.

Free Silver Lode vs. Blank Lode.

In the matter of the application of John Smith for a United States patent for the Blank Lode mining claim.

To the Honorable Register and Receiver:

Whereas, John Smith did, on the eleventh day of April, A. D. 1896, file in the United States land office at Pueblo, State of Colorado, his application

for a United States patent for the pretended Blank Lode mining claim, mineral survey No. 7777, situate in the Cripple Creek Mining District, county of El Paso, State of Colorado, and has given notice of his said application for patent, the legal period of sixty days of publication and posting of said notice not yet having expired:

Now, therefore, comes the Free Silver Mining Company, by William Jones, its duly authorized agent, on this first day of June, A. D. 1896, and enters this its protest against the allowance of mineral entry upon said application for patent for said pretended Blank Lode mining claim, for that, to wit:

I. Because the said pretended Blank Lode mining claim, applied for as aforesaid, is not the property of the said John Smith, nor is the applicant for patent aforesaid entitled to hold the same under the laws of the United States or of the State of Colorado, or the miners' customs and regulations of the Cripple Creek Mining District.

II. Because a great portion of the said pretended Blank Lode mining claim (which portion is described in the plat filed herewith and made a part hereof, made and certified by a United States Deputy Mineral Surveyor) is owned by and in the possession of your protestant as the Free Silver Lode mining claim, as is shown by the abstract of title to said Free Silver Lode mining claim, filed herewith and made a part hereof, which said ownership and possession is vested in your protestant by virtue of a location of the said Free Silver Lode mining claim upon the vacant, unappropriated public domain, in strict accordance and compliance with the laws of the United States, of the State of Colorado, and the miners' customs and regulations of the Cripple Creek Mining District, the notice of which said location is recorded in the office of the County Recorder of El Paso county, Colorado, at page 1 of Book M of Locations, which said location was made by Thomas Jenkins, and was conveyed by him to your protestant.

III. Because the said pretended Blank Lode mining claim, applied for as aforesaid, or a great portion thereof, overlaps, conflicts with and embraces the said Free Silver Lode mining claim of your protestant, as is shown by the plat of survey filed herewith and made a part hereof, made and certified by a United States Deputy Mineral Surveyor, which plat shows the true relative positions of the said pretended Blank Lode mining claim applied for as aforesaid, and of the said Free Silver Lode mining claim of your protestant.

Wherefore, your protestant does pray that all proceedings before the Land Department, looking to the allowance of mineral entry upon said application for patent for the said pretended Blank Lode mining claim, or the issuance of patent for the same, be suspended as provided by section 2326 of the United States Revised Statutes, to the end that your protestant may secure a determination of its adverse claim and right in a court of competent jurisdiction, in accordance with the statute for such cases made and provided.

And for further cause of protest against the application for patent for said pretended Blank Lode mining claim, your protestant alleges that neither the applicant for said Blank Lode claim nor his grantor have ever made a legal discovery upon said claim of a vein or lode of mineral-bearing rock in place.

THE FREE SILVER MINING COMPANY,
By WILLIAM JONES, its Agent.

STATE OF COLORADO, } ss.
County of El Paso. }

Subscribed and sworn to before me this first day of June, A. D. 1896.

[*Seal.*] RICHARD JONES,
Notary Public.

No. 13.

Register's Certificate of Posting Notice for Sixty Days.

UNITED STATES LAND OFFICE AT ——,
——, 18—.

I hereby certify that the official plat of the —— lode, designated by the Surveyor General as lot No. ——, was filed in this office on the —— day of ——, A. D. 18—, and that a notice, of which the attached notice is a copy, of the intention of —— —— to apply for a patent for the mining claim or premises embraced by said plat, and described in the field notes of survey thereof filed in said application, was posted conspicuously in this office on the —— day of ——, A. D. 18—, and remained so posted until the —— day of ——, A. D. 18—, being the full period of sixty consecutive days during the period of publication as required by law; and that said plat remained in this office during that time, subject to examination, and that no adverse claim thereto has been filed.

—— ——,
Register.

No. 14.

Application to Purchase.

To the Register and Receiver of United States Land Office at ——:

The undersigned claimant, under the provisions of the Revised Statutes of the United States, Chapter six, Title thirty-two, and legislation supplemental thereto, hereby applies to purchase that mining claim known as the ——, in section ——, in township No. —— of range No. ——, —— meridian, designated as lot No. ——, said lot No. —— extending —— feet in length along said —— vein or lode, but *expressly excepting and excluding* from this application all that portion of the ground embraced in mining claim or survey designated as lot No. ——; and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground; said lode —— claim embracing —— acres and said mill site claim —— acres, in the —— Mining District, in the county of —— and —— of ——, as shown by the survey thereof, and hereby agrees to pay therefor —— dollars, being the legal price thereof.

Dated ——, 18—. —— ——.

I, —— ——, register of the land office at ——, do hereby certify that the aforesaid mining claim or lot No. ——, as applied for above, is subject to entry by the above named applicant; the area of said lode —— claim being —— acres and of said mill site claim —— acres, and the legal price thereof —— dollars.

—— ——, 18—. —— ——,
Register.

No. 15.

Receiver's Receipt.

(DUPLICATE TO BE GIVEN THE PURCHASER.)

MINERAL ENTRY No. ——, }
LOT No. ——. }

UNITED STATES LAND OFFICE AT ——,
——, 18—.

Received from —— —— the sum of —— dollars, the same being payment in full for the area embraced in that mining claim known as the ——, in section ——, in township No. —— of range No. ——, —— meridian, designated as lot No. ——, said lot No. —— extending —— feet in length along said —— vein or lode, *expressly excepting and excluding* from this sale and entry all that portion of the ground embraced in mining claim or survey designated as lot No. ——; and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground; said lode —— claim as entered embracing —— acres and said mill site claim —— acres, in the —— Mining District, in the county of —— and —— of ——, as shown by the survey thereof.

——,
Receiver.

No. 16.

Register's Final Certificate of Entry.

MINERAL ENTRY No. ——, }
LOT No. ——. }

UNITED STATES LAND OFFICE AT ——,
——, 18—.

It is hereby certified that, in pursuance of the provisions of the Revised Statutes, Chapter six, Title thirty-two, and legislation supplemental thereto, —— ——, whose postoffice address is ——, on this day purchased that mining claim known as the ——, in section ——, in township No. ——, of range No. ——, —— meridian, designated as lot No. ——, said lot No. —— extending —— feet in length along said —— vein or lode, *expressly excepting and excluding* from said purchase all that portion of the ground embraced in mining claim or survey designated as lot No. ——; and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground; said lode —— claim, as entered, embracing —— acres, and said mill site claim —— acres, in the —— Mining District, in the county of —— and —— of ——, as shown by the plat and field notes of survey thereof, for which the said party first above named this day made payment to the receiver in full, amounting to the sum of —— dollars.

Now, therefore, be it known that upon the presentation of this certificate to the Commissioner of the General Land Office, together with the plat and field

notes of survey of said claim and the proofs required by law, a patent shall issue thereupon to the said —— —— if all be found regular.

—— ——,
Register.

No. 17.

Patent for Lode Claim.

GENERAL LAND OFFICE
No. ——.

MINERAL CERTIFICATE
No. ——.

THE UNITED STATES OF AMERICA, To all to whom these Presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, Chapter six, Title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field notes of survey and the certificate, No. ——, of the register of the land office at ——, in the —— of ——, accompanied by other evidence, whereby it appears that —— —— did, on the —— day of ——, A. D. 18—, duly enter and pay for that certain mining claim or premises known as the ——, designated by the Surveyor General as lot No. ——, in the —— Mining District, in the county of —— and —— of ——, in the district of lands subject to sale at ——, and bounded, described and platted as follows, with magnetic variation ——:

Beginning ——. [*Here follows description of the claim.*]

Now know ye, that there is therefore hereby granted by the United States unto the said —— —— and to —— —— and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said —— vein, lode or ledge, and of all other veins, lodes and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. ——, extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises: *Provided*, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot No. ——, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges: *And provided further*, that nothing herein contained shall authorize the grantee herein to enter upon the *surface* of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatever nature thereunto belonging, unto the said grantee above named, and to —— —— and assigns forever, subject nevertheless to the above-mentioned and the following conditions and stipulations:

First. That the premises hereby granted, *with the exception of the surface*, may be entered by the proprietor of any other vein, lode or ledge the top or

apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the legislature of —— may provide rules for working the mining claim or premises hereby granted, involving easements, drainage and other necessary means to its complete development.

In testimony whereof, I, —— ——, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the —— day of ——, in the year of our Lord one thousand eight hundred and ninety ——, and of the independence of the United States the one hundred and ——.

By the President: —— ——.

By —— ——,

Secretary.

—— ——,

Recorder of the General Land Office.

Recorded vol. ——, pages —— to ——, inclusive.

No. 18.

Patent for Placer with Included Lode.

GENERAL LAND OFFICE
No. ——.

MINERAL CERTIFICATE
No. ——.

THE UNITED STATES OF AMERICA, To all to whom these Presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, Chapter six, Title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field notes of survey, and the certificate, No. ——, of the register of the land office at ——, in the —— of ——, accompanied by other evidence, whereby it appears that —— —— did, on the —— day of ——, A. D. 18—, duly enter and pay for that certain placer mining claim and premises, designated by the Surveyor General as lot No. ——, in the —— Mining District, in the county of —— and —— of ——, in the district of lands subject to sale at ——, and bounded, described and platted as follows, with magnetic variation ——:

Beginning ——. [*Here follows a description of the placer claim and of the lode according to the official survey.*]

Now know ye, that there is therefore hereby granted by the United States unto the said —— ——, and to —— —— and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, with all that portion of the said —— vein, lode or ledge, and of all other veins, lodes and ledges, through their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said —— lode claims in said lot No. ——, extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said —— lode claim: *Provided*, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said —— lode claim, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges: *And provided further*, that nothing herein contained shall authorize the grantee herein to enter upon the *surface* of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said grantee above named, and to —— —— and assigns forever; subject nevertheless to the above-mentioned and to the following conditions and stipulations:

First. That the said —— lode claim hereby granted, *with the exception of the surface*, may be entered by the proprietor of any other vein, lode or ledge the top or apex of which lies outside of the boundary of such granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

Second. That the grant of the placer mining ground hereby made is restricted in its exterior limits to the boundaries thereof, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, which may have been discovered within said limits subsequent to and which were known to exist on the —— day of ——, A. D. 18—.

Third. That should said vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist within the above-described placer mining ground at said last-named date, the same is expressly excepted and excluded from these presents.

Fourth. That the placer mining ground hereby conveyed may be entered by the proprietor of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, for the purpose of extracting and removing the ore from such vein or lode, should the same, or any part thereof, be found to penetrate, intersect, pass through or dip into the mining ground or premises hereby granted.

Fifth. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with

such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

Sixth. That in the absence of necessary legislation by Congress, the legislature of —— may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to the complete development thereof.

In testimony whereof, I, —— ——, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the —— day of ——, in the year of our Lord one thousand eight hundred and ——, and of the independence of the United States the one hundred and ——.

[*Seal.*] By the President: —— ——.

By —— ——,

Secretary.

—— ——,

Recorder of the General Land Office.

Recorded, vol. ——, pages —— to ——, inclusive.

No. 19.

Patent for Placer taken by Mineral Survey.

General Land Office No. ——. Mineral Certificate No. ——.

The United States of America, To all to whom these Presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, Chapter six, Title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field notes of survey and the certificate, No. ——, of the register of the land office at ——, in the —— of ——, accompanied by other evidence, whereby it appears that —— —— did, on the —— day of ——, A. D. 18—, duly enter and pay for that certain placer mining claim and premises, designated by the Surveyor General as lot No. ——, in the —— Mining District, in the county of —— and —— of ——, in the district of lands subject to sale at ——, and bounded and described and platted as follows, with magnetic variation ——:

Beginning ——. [*Here follows description of the claim.*]

Now know ye, that there is therefore hereby granted by the United States unto the said —— —— and to —— —— and assigns, the said placer mining premises hereinbefore described.

To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said grantee above named, and to —— —— and assigns forever; subject nevertheless to the following conditions and stipulations:

First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said mining premises, and to any veins or lodes of quartz or

other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, which may have been discovered within said limits subsequent to and which were not known to exist on the —— day of ——, A. D. 18—.

Second. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist within the above-described premises at said last-named date, the same is expressly excepted and excluded from these presents.

Third. That the premises hereby conveyed may be entered by the proprietor of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, for the purpose of extracting and removing the ore from such vein or lode, should the same, or any part thereof, be found to penetrate, intersect, pass through or dip into the mining ground or premises hereby granted.

Fourth. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by authority of the United States.

Fifth. That in the absence of necessary legislation by Congress, the legislature of —— may provide rules for working the mining claim or premises hereby granted, involving easements, drainage and other necessary means to complete development thereof.

In testimony whereof, I, —— ——, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the —— day of ——, in the year of our Lord one thousand eight hundred and ninety ——, and of the independence of the United States the one hundred and ——.

By the President: —— ——.

By —— ——,

Secretary.

—— ——,

Recorder of the General Land Office.

Recorded, vol. ——, pages —— to ——, inclusive.

No. 20.

Patent for Placer taken by Legal Subdivisions.

(First page only. Remainder of patent is identical with latter portion of preceding placer patent.)

General Land Office
No. ——.

Mineral Certificate
No. ——.

The United States of America, To all to whom these Presents shall come, Greeting:

Whereas, In pursuance of the provisions of the Revised Statutes of the United States, Chapter six, Title thirty-two, and legislation supplemental

thereto, there has been deposited in the General Land Office of the United States the certificate, No. ——, of the register of the land office at ——, in the —— of ——, accompanied by other evidence, whereby it appears that —— —— did, on the —— day of ——, A. D. 18—, duly enter and pay for that certain placer mining claim and premises [*here follows description of the claim by legal subdivisions*].

No. 21.

Patent for Mill Site.

GENERAL LAND OFFICE
No. ——.

MINERAL CERTIFICATE
No. ——.

THE UNITED STATES OF AMERICA, To all to whom these Presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, Chapter six, Title thirty-two [*here follow recital of entry of the land, with a description of the land in accordance with the official survey thereof*].

Now know ye, that the United States of America, in consideration of the premises and in conformity with said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said —— —— and to —— —— and assigns, the said premises above described as lot No. ——, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents.

To have and to hold said mill site or premises, together with all the rights, privileges, immunities and appurtenances of whatever nature thereunto belonging, unto the said —— —— and to —— —— and assigns forever, subject nevertheless to the following conditions and stipulations:

First. That the premises hereby conveyed may be entered by the proprietor of any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, for the purpose of extracting and removing the ore from such vein, lode or deposit, should the same or any part thereof be found to penetrate, intersect, pass through or dip into the premises hereby granted.

Second. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

Third. That in the absence of necessary legislation by Congress, the legislature of —— may provide rules for working the mining claim or premises hereby granted, involving easements, drainage and other necessary means to the complete development thereof.

In testimony whereof, I, —— ——, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the —— day of ——, in

the year of our Lord one thousand eight hundred and ——, and of the independence of the United States the one hundred and ——.

By the President: —— ——.

By —— ——,

Secretary.

—— ——,

Recorder of the General Land Office.

Recorded, vol. ——, pages —— to ——, inclusive.

No. 22.

Coal Patent.

GENERAL LAND OFFICE
No. ——.

COAL CERTIFICATE
No. ——.

THE UNITED STATES OF AMERICA, To all to whom these Presents shall come, Greeting:

Whereas, in pursuance of the Revised Statutes of the United States, there has been deposited in the General Land Office of the United States the certificate of the register of the land office at ——, in the —— of ——, whereby it appears that —— —— did, on the —— day of ——, A. D. 18—, enter and pay for the ——, embracing —— acres of land, more or less, as shown by the official plat of the survey of said land returned to the General Land Office by the Surveyor General; the same being coal entry No. —— in the —— series of said office.

Now know ye, that the United States of America, in consideration of the premises, and in conformity with said act of Congress, have given and granted, and by these presents do give and grant, unto the said —— —— and to —— ——, the said tract above described: To have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said —— —— and to —— —— and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, —— ——, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the —— day of ——, in

the year of our Lord one thousand eight hundred and ninety ——, and of the independence of the United States the one hundred and ——.

By the President: —— ——.

By ——,

Secretary.

——,

Recorder of the General Land Office.

Recorded, vol. ——, page ——.

No. 23.

Affidavit of Loss of Duplicate Receipt.

In the matter of Mineral Entry No. 777, —— Land District, for the Blank Lode claim.

STATE OF COLORADO, } ss.
County of El Paso. }

John Smith, being first duly sworn according to law, deposes and says that he is the identical person who, on the —— day of ——, A. D. 1896, made mineral entry No. 777, in the —— land office, for the Blank Lode mining claim.

That affiant has lost the receiver's duplicate receipt issued to him at the date of said mineral entry, and is wholly unable to find the same, though he has made diligent search therefor.

That affiant is the present owner of said Blank Lode mining claim, not having sold the same since the date of said mineral entry.

Wherefore, affiant asks that the United States patent issued upon said mineral entry be delivered to him.

JOHN SMITH.

Subscribed and sworn to before me, a notary public, this eleventh day of April, A. D. 1896.

[*Seal.*]

RICHARD JONES,
Notary Public.

NOTE.— If affiant claims as transferee of the entryman, the fact should be briefly stated, showing loss of receipt either by his grantor or by affiant, and alleging affiant to be the present owner of the claim.

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